80-2170

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER
v.
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a proceeding under Section 106(a) of the Immigration and Nationality Act to review a final order of deportation, a court of appeals has jurisdiction to review the constitutionality of Section 244 (c)(2) of the Act, which establishes Congressional procedures for determining whether a particular deportation proceeding should be cancelled and the alien given permanent resident status.

2. Whether a concededly deportable alien has standing, in a Section 106(a) review proceeding, to challenge the constitutionality of Section 244(c)(2), pursuant to which the House of Representatives disapproved cancelling the deportation and granting the alien permanent resident status.

3. Whether such a review proceeding constitutes a constitutional case or controversy where (a) both the deportable alien and the Immigration and Naturalization Service, the only two parties to the proceeding, are in total agreement that Section 244(c)(2) is unconstitutional and that the deportation order should be cancelled, and (b) the deportable alien declines to seek other available relief from deportation, including the right to apply for permanent resident status following his recent marriage to an American citizen.

4. Whether the propriety of the Section 244(c)(2) procedures for Congressional adjustment of the status of deportable aliens is a "political question."

5. Whether Section 244(c)(2) of the Immigration and Nationality Act is severable from the remainder of Section 244, where any power the Attorney General may have to cancel deportation and adjust an alien's

status is conditioned upon favorable Congressional action pursuant to Section 244(c)(2).

6. Whether the Congressional procedures specified in Section 244(c)(2) constitute "necessary and proper" means of executing the plenary, sovereign power of Congress over the status and deportation of aliens, and is consistent with the letter and spirit of other provisions of the Constitution, particularly the separation of powers doctrine.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Ninth Circuit: (1) Jagdish Rai Chadha, a respondent herein; (2) the Immigration and Naturalization Service, a respondent herein. At all times, the Immigration and Naturalization Service has been represented by Department of Justice counsel.

Amici curiae before the Ninth Circuit, by invitation of the court: (1) the United States House of Representatives; (2) the United States Senate.

Intervening parties after judgment of the Ninth Circuit: (1) the United States House of Representatives, the petitioner herein; (2) the United States Senate, a nominal respondent herein and a separate petitioner. The Ninth Circuit granted the motions of the House and Senate to intervene on March 10, 1981. See Appendix G of jurisdictional statement in No. 80–1832, p. 75a.

Authorization to intervene on behalf of the House of Representatives was granted to the Speaker of the House by H. Res. 49, 97th Cong., 1st Sess., unanimously agreed to on January 29, 1981, 127 Cong. Rec. H 260 (Jan. 29, 1981, daily ed.). The full text of H. Res. 49 is as follows:

H. RES. 49

IN THE HOUSE OF REPRESENTATIVES, U.S.,
JANUARY 29, 1981.

Whereas, on February 27, 1978, a brief amicus curiae was submitted on behalf of the Chairman of the Committee on House Administration in the United States Court of Appeals for the Ninth Circuit in the case of Chadha v. Immigration and Naturalization Service, No. 77-1702, in support of the constitutionality of the legislative review provision in section 244(c)(2) of the Immigration and Naturalization Act, 8 U.S.C. 1254(c)(2), and on December 22, 1980, the Court of Appeals ruled that this legislative review provision violated the principle of separation of powers and was unconstitutional, and the Department of Justice, although it prevailed before the Court of Appeals, has filed a notice of appeal to the Supreme Court;

Whereas, the United States Court of Appeals for the District of Columbia Circuit is now considering the case of Consumer Energy Council of America et al v. Federal Energy Regulatory Commission, Nos. 80-2184 and 80-2312 wherein the Department of Justice has submitted a brief amicus curiae urging that the legislative review provisions of section 202 of the Natural Gas Policy Act, 15 U.S.C. 3342, are unconstitutional, and the Attorney General has suggested that the House submit a brief amicus curiae in support of these legislative review provisions;

Whereas, it is essential that the House be given an opportunity to present fully its views to the appropriate court in both of these cases, either as amicus curiae or by intervention as a party: Now, therefore, be it

Resolved, That the Speaker is authorized to retain counsel and take any steps he considers necessary, including intervention or submission of briefs amicus curiae, to protect the interests of the House before the court in the case of Chadha v. Immigration and Naturalization Service and in the case of Consumer Energy Council of America et al v. Federal Energy Regulatory Commission.

Attest:

[SEAL] EDMUND L. HENSHAW, Jr.,
Clerk.

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UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The United States House of Representatives, acting through the Speaker of the House pursuant to H. Res. 49, 97th Cong., 1st Sess., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 22, 1980, in the proceeding there captioned *Jagdish Rai Chadha* v. *Immigration and Naturalization Service,* No. 77-1702.

OPINIONS BELOW

The opinion of the Ninth Circuit, dated December 22, 1980, is reported at 634 F.2d 408. It is reprinted in Appendix A of the jurisdictional statement filed by the Immigration and Naturalization Service in No. 80-1832, pp. 1a–63a. The unreported administrative decisions are also reported in the appendices to that jurisdictional statement; the two decisions of the INS immigration judge appear in Appendix B, pp. 64a–66a, and in Appendix D, pp. 70a–71a, while the opinion of the Board of Immigration Appeals appears in Appendix E, p. 72a–73a.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 22, 1980, more than two and one-half years subsequent to the oral argument on April 10, 1978. That judgment is reprinted in the Senate's petition for certiorari, Appendix K, p. 84a.

On February 3, the Speaker of the House of Representatives and the Senate filed motions to intervene in order to file, *inter alia,* a petition for rehearing with a suggestion for rehearing *en banc* (the Ninth Circuit having extended the time for filing such a petition). On March 10, 1981, the Ninth Circuit granted the motions to intervene and ordered that the timely filed petition for rehearing *en banc* be circulated to the active judges of the court. J.S.App.G, p. 75a. On March 25, 1981, the Ninth Circuit denied the petition for rehearing filed by the Speaker of the House and the Senate, and rejected the suggestion for a rehearing *en banc*. J.S.App.H, p. 76a. This petition was filed within 90 days of the denial of rehearing. On April 8, 1981, on an unopposed motion of the Speaker and the Senate, the Ninth Circuit stayed its mandate pending the filing of petitions for certiorari on or before June 23, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In the Appendix hereto, p. 27, *infra,* are contained the various constitutional and statutory provisions that the petitioner deems pertinent to this case. Those provisions are:

1. Article I, Section 1, of the Constitution.
2. Article I, Section 7, Clauses 2 and 3, of the Constitution.
3. Portions of Article I, Section 8, of the Constitution.
4. Article II, Section 1, of the Constitution.
5. A portion of Article II, Section 3, of the Constitution.
6. Section 244(c) (1) and (2) of the Immigration and Nationality Act of 1952.
7. A portion of Section 106(a) of that Act.

STATEMENT

A. EVENTS LEADING TO FINAL DEPORTATION ORDER

1. The respondent Chadha is a native of Kenya, and is now a citizen and subject of Great Britain. He was originally admitted to the United States in 1966 as a nonimmigrant student, under Section 101(a)(15)(J) of the Immigration and Nationality Act of 1952, for a temporary period only. After being extended, that period finally expired on June 30, 1972. App. 44.[1]

2. Having overstayed the authorized time limit, Chadha became subject to deportation in accordance

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[1] Citations herein to "App. ——" refer to the printed Appendix before the Ninth Circuit; that Appendix contains the entire record of the INS administrative proceedings leading to the final order of deportation. Citations herein to "J.S. App. ——" are to the various appendices in the INS jurisdictional statement before this Court in No. 80–1832.

with Section 241(a)(2) of the Act.[2] The Immigration and Naturalization Service (hereinafter "INS") accordingly issued an order to show cause why he should not be deported under that section. A hearing on the order to show cause was held before an INS immigration judge in January of 1974. At that hearing, Chadha's counsel conceded "that he is deportable as charged." App. 19–20. In accord with that concession, the INS immigration judge concluded in his June 25, 1974, decision that Chadha "is deportable as charged" in the show cause order. App. 8, 13; J.S. App. B, p. 65a, J.S. App. D, p. 70a. Chadha has never retracted that concession, and his deportability was in effect reaffirmed in the final deportation order issued by the INS immigration judge in 1976. The Board of Immigration Appeals also acknowledged Chadha's deportability when it dismissed his appeal from the final deportation order in February of 1977. App. 1–2; J.S. App. E, pp. 72a–73a.

3. But the 1974 proceedings did not lead immediately to the entry of a final order of deportation. Immediately upon the oral concession of deportability during that 1974 hearing, Chadha's counsel made an oral application for "suspension of deportation" pursuant to Section 244(a)(1) of the Act. See App. 20. The show cause hearing was then adjourned so that a written application for suspension of deportation could be prepared and submitted. See App. 44–47.

4. The respondent Chadha was able to invoke the Section 244 suspension procedure only because he was in fact deportable under Section 241(a)(2). As Section 244(a)(1) provides, an alien may apply for sus-

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[2] Section 241(a)(2) directs the Attorney General to deport any alien "who is in the United States in violation of this chapter." Having overstayed the statutory time limit, Chadha was "in the United States" in violation of the Act.

pension of deportation only if *inter alia,* he "is deportable under any law of the United States." On that basis, Chadha was eligible to apply for suspension. Under Section 244(a)(1), the alien must also have been physically present in the United States for seven continuous years immediately preceding the application, and prove that he was of good moral character during all that period. Most importantly, he must be "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child. who is a citizen of the United States or an alien lawfully admitted for permanent residence."

5. As evidenced in this case, the Attorney General has delegated most of his discretionary authority under Section 244(a)(1) to INS immigration judges. See J.S., p. 4, n. 2. But it is noteworthy that the decision of an INS immigration judge is not final. If the suspension application is denied, the decision is ultimately reviewable in the courts. On the other hand, a favorable decision merely "suspends" the deportation pending completion of the Congressional phase of the Section 244 procedures.

6. It should also be noted at this point that the only statutory authority for cancelling deportation, following a grant of suspension of deportation by an INS immigration judge, is after the exhaustion of the Congressional procedures specified in Section 244(c)(2). The last sentence of that section provides that if "neither the Senate nor the House of Representatives shall pass such a resolution [disapproving any change in the alien's deportable status], the Attorney General shall cancel deportation proceedings." When such cancellation is authorized, Section 244(d) further directs the Attorney General to "record the alien's lawful admission for permanent residence as of the

date the cancellation of deportation of such alien is made.

7. At the subsequent suspension hearing on February 7, 1974, Chadha rested his "extreme hardship" claim mainly on his own statements that neither Kenya nor Great Britain "want me or people of my ethnic background," that "I do not want to subject myself to any economic, racial or political hostilities," that he had resided in the United States for seven years and considered it to be "my home," that he was "well adjusted to the entire American philosophy of living," and that "most important I am engaged to an American citizen . . . and we contemplate getting married sometime in the future."[3] Evidence was also submitted that indicated he would need work permits or employment vouchers to be able to work in either Kenya or the United Kingdom, which might take some time to obtain. At the end of Chadha's testimony, the following colloquy took place (App. 37–39):

> The IMMIGRATION JUDGE. Do you intend to get married in the near future?
>
> RESPONDENT. It's not—well I cannot pinpoint the time but we eventually would get married.

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[3] Late in November of 1980, respondent Chadha filed a memorandum in the Ninth Circuit stating that on August 10, 1980, he had married a citizen of the United States, although not the one to whom he had been engaged in 1974. He recognized that he was eligible to have an immediate relative visa petition filed by his wife and to apply for adjustment of his status to permanent resident alien. See 9 CFR 204.1; 8 U.S.C. § 1151(b). But he proclaimed that "there is no present intention" to seek such an adjustment. Before the INS or Congressional *amici* had a chance to comment on this development, the Ninth Circuit issued its option on December 22, 1980. In footnote 6 of that opinion, J.S.App.A, p. 17a, the Ninth Circuit stated that the marriage and the eligibility for change in status did not make the case moot.

The IMMIGRATION JUDGE. The reason I ask this is because your case is not a particularly good one for suspension of deportation. However, if you got married you would have no difficulty in having your status adjusted. Anything else, Mr. Mittleman?

Mr. MITTLEMAN [Chadha's counsel]. No, your Honor.

* * * * *

The IMMIGRATION JUDGE. Mr. Mittleman, I'm unable to find on the basis of the evidence submitted that Mr. Chadha would suffer the extreme hardship required by the statute. Accordingly, I am going to deny his application for suspension of deportation. Now as an alternative you have asked for asylum on his behalf.

Mr. MITTLEMAN. Yes, your Honor.

The IMMIGRATION JUDGE. All right. I won't render my decision now. I'm going to adjourn the case so that you may proceed with your application for asylum. You will hear from the Immigration and Naturalization Service in connection with that application.

* * * * *

The hearing is adjourned.

The hearing is resumed.

The IMMIGRATION JUDGE. Mr. Mittleman, on further thought I think I might be inclined to grant this application for suspension of deportation. Accordingly, I am going to ask you to withdraw for the present your request for asylum in behalf of the respondent. Do you agree?

Mr. MITTLEMAN. I withdraw it. Yes, I do.

* * * * *

The hearing is closed.

8. On June 25, 1974, the INS immigration judge issued his formal decision granting Chadha's application for suspension of deportation. J.S. App. B, pp. 64a–66a. Without explaining his sudden change of mind at the February hearing, the judge wrote:

> The respondent [Chadha] has established that it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation. He has stated that his deportation would result in a hardship to him because he has formed strong personal ties with friends and because it is questionable whether he would be able to utilize his education in other countries.
>
> Because of his race and the difficulties he would face by reason thereof, I am satisfied that his deportation would result in an extreme hardship to him. I am also of the opinion that because of this circumstance, his application for suspension of deportation should be granted as a matter of administrative discretion.

9. But, in accordance with the above-described statutory scheme, the INS immigration judge's decision of June 25, 1974, did not order that the deportation proceedings be cancelled. Rather, the decision recognized that the suspension order was conditional and that cancellation would depend upon what action Congress took pursuant to Section 244(c)(2). Thus, the judge ordered (J.S.App.B, at p. 66a):

> *It is ordered,* That the deportation of the respondent be suspended under the provisions of Section 244(a)(1) of the Immigration and Nationality Act, as amended.
>
> *It is further ordered,* That if Congress takes no action adverse to the order granting suspension

> of deportation, the proceedings be cancelled and that appropriate action be taken pursuant to Section 244(d) of the Immigration and Nationality Act, as amended.
>
> *It is further ordered,* That in the event Congress takes action adverse to the order granting suspension of deportation these proceedings shall be reopened upon notice to the respondent.

10. A full report on Chadha's case was made to the Congress by the INS, acting on delegated authority from the Attorney General. This was done in compliance with Section 244(c)(1), which provides that if the deportation of any alien is suspended—as in Chadha's case—"a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension."

11. Congress thereafter considered Chadha's case in accordance with the procedures set forth in Section 244(c)(2). On the House side, the Judiciary Subcommittee on Immigration, Citizenship, and International Law made a full inquiry into the record before the INS with respect to Chadha's eligibility for suspension, as well as his eligibility for the ultimate relief of cancellation of deportation and a change in status to that of a permanent resident alien. Available in this review was the transcript of the suspension hearing in which the INS immigration judge had made so sudden and inexplicable a reversal of his evaluation of Chadha's eligibility for suspension. The Subcommittee determined that Chadha should not be granted relief from deportation by way of granting him permanent residence status. The full Judiciary Committee, after due consideration, accepted the Subcommittee's con-

clusion. H. Res. 926 was thereupon prepared for submission to the House.

12. On December 16, 1975, the House unanimously adopted H. Res. 926. 121 Cong. Rec. 40800; J.S.App C, pp. 67a–69a. The resolution itself stated that "the House of Representatives does not approve the granting of permanent residence in the United States to the [six] aliens hereinafter named [including Chadha], in which cases the Attorney General has submitted reports to the Congress pursuant to section 244(a)(1) of the Immigration and Nationality Act, as amended." Rep. Eilberg, Chairman of the Subcommittee on Immigration, explained that it was the Committee's feeling that Chadha and the other named aliens did not meet the statutory requirements necessary for relief from deportation, "particularly as it relates to hardship." Such action by the House was in strict conformity with Section 244(c)(2), the procedural provision found unconstitutional by the Ninth Circuit.

13. In light of the House adoption of the disapproval resolution and in accordance with the terms of the INS order suspending Chadha's deportation, the INS reopened the suspended deportation proceedings. Where one House has taken such action, Section 244 (c)(2) directs that "the Attorney General shall thereupon deport such alien." And so at the reopened hearing before the INS immigration judge on August 4, 1976, Chadha was given one last chance to show why he should not be deported in accordance with Section 241(a)(2), as originally charged. That he could not do. The immigration judge accordingly entered a final and uncontested order that Chadha be deported to the United Kingdom "on the charge set forth in the Order to Show Cause." App. 6–7; J.S. App. D, pp. 70a–71a.

This order was a part of the judge's decision dated November 8, 1976.

14. While making no claim at the reopened hearing that he was not deportable as charged, Chadha did move to terminate the deportation proceeding "on the grounds that Section 244(c)(2) of the Immigration and Nationality Act is unconstitutional in that it's violative of the separation of powers doctrine." App. 9. The judge's decision of November 8, 1976, rejected that contention on the ground that the judge had no authority to pass on the constitutionality of Acts of Congress. App. 6–7; J.S. App. D, pp. 70a–71a.

15. Chadha renewed his attack on the validity of Section 244(c)(2) on his appeal to the Board of Immigration Appeals from the final order of deportation. The Board dismissed the appeal and affirmed the final deportation order. In so doing, the Board found Chadha's constitutional contentions respecting Section 244(c)(2) to be "without merit." App. 1–2; J.S. App. E, pp. 72a–73a.

B. JUDICIAL REVIEW OF THE FINAL DEPORTATION ORDER

16. On March 24, 1977, the appellee Chadha filed in the Ninth Circuit a petition for review of the final deportation order pursuant to Section 106(a) of the Act, 8 U.S.C. § 1105a(a), which permits judicial review of such orders. Chadha's petition in no way questioned the statutory or constitutional propriety of the final deportation order. Nor was any complaint made that he had proved "extreme hardship" and that the House had acted arbitrarily in denying him relief on that basis. The sole contention was that the Section 244(c)(2) procedure, whereby either House can disapprove a change in the deport-

able status of an alien, exceeded the legislative powers of Congress and invaded functions vested by the Constitution exclusively in the Executive Branch. Chadha's brief on the merits was devoted solely to developing those constitutional contentions.[4] The brief made no reference to any personal rights of Chadha being at stake.

17. So single-minded was Chadha's claim that the Section 244(c)(2) procedure invaded the President's constitutional functions that his brief neglected to request that the order of deportation be set aside, a deficiency that was soon rectified by the INS brief on the merits. Chadha's brief concluded with a peroration that the Ninth Circuit should prevent an undoing of "the whole fabric of the Constitution . . . by declaring the one-House veto provision of Section 244 (c)(2) repugnant to the Constitution." Brief, p. 61.

18. The INS responded in the Ninth Circuit with a brief in total agreement with Chadha's constitutional contentions, while adding a few refinements thereto.[5] The brief commenced with the statement that the INS, as respondent, "agrees with petitioner that Sec-

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[4] Chadha made four points in his brief on the merits: (1) neither the power to regulate naturalization nor the Necessary and Proper Clause empowers Congress to act in contravention of other constitutional provisions; (2) the "Congressional veto" violates the separation of powers doctrine; (3) the "Congressional veto" deprives the President of the opportunity to exercise his veto power under Article I, Section 7; and (4) the "one-House veto" provision violates the requirement of a bicameral Legislature.

[5] The INS brief on the merits made three points: (1) Section 244(c)(2) violates the Article I procedures for enactment of the laws of the United States; (2) Section 244(c)(2) is an intrusion into executive and judicial powers and functions, in violation of the separation of powers doctrine; and (3) Section 244(c)(2) is severable from other provisions of the Act.

tion 244(c)(2) of the Immigration and Nationality Act is unconstitutional." Brief, p. 7. It concluded with the request that "this Court should set aside the [INS] order for petitioner's deportation." Brief, p. 36.[6] That was the same deportation order, incidentally, that Chadha has consistently acknowledged is proper under the unchallenged provisions of Section 241(a)(2).

19. Since it was evident that Chadha and the INS were in complete agreement as to the only matter in issue (the constitutionality of Section 244(c)(2)), as well as to the relief sought, the Ninth Circuit invited the House of Representatives and the Senate to appear as *amici* to defend the constitutionality of the Section 244(c)(2) procedures. The invitations were accepted, although with no intent to supply any adverseness that might be deemed necessary as between the parties to this case.

20. The Congressional *amici* proceeded to participate in the briefing and oral arguments before the Ninth Circuit. In addition to arguing in defense of the constitutionality of Section 244(c)(2), the *amici* urged various prudential, procedural and jurisdictional reasons why the difficult constitutional issues should not and need not be reached. The Ninth Circuit rejected all such threshold contentions. And in this Court, the INS jurisdictional statement in No. 80–1832, at pp. 6–7, n. 6, expresses total satisfaction with the Ninth Circuit's disposition of the threshold matters. In so doing, the INS has differed not one whit from Chadha's position on these matters.

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[6] In its reply to the briefs of Congressional *amici*, the INS reiterated that "Section 244(c)(2) is unconstitutional," and therefore "this Court should set aside the [INS] order for petitioner's deportation." Reply Brief, at 13, 18.

21. The Ninth Circuit's decision, more than two and a half years in the making, systematically rejected all arguments advanced by the Congressional *amici*. In summary, the court held:

(a) The court ruled it had jurisdiction to determine the validity of Section 244(c)(2) in the context of a Section 106(a) proceeding, which authorizes judicial review of "all final orders of deportation . . . made against aliens . . . pursuant to administrative proceedings under section 242(b)."[7] The term "final orders" was construed to include all matters on which the validity of a final order is contingent. Thus since the validity of Chadha's final order was contingent upon the validity of the House disapproval resolution under Section 244(c)(2), the constitutionality of that section could be attacked in this review of the final deportation order. J.S.App.A, pp. 4a–11a.

(b) Chadha was held to have standing to protest the validity of Section 244(c)(2) since he can directly trace his injury in fact—i.e., deportation—to the operation of Section 244(c)(2). The court said that if Section 244(c)(2) were invalidated, the original suspension under Section 244 (a) would be reinstated and Chadha's status adjustment would become permanent. Thus, concluded the court, Chadha has made out an Article III case or controversy. J.S.App.A, pp. 12a–20a.

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[7] One day after the oral argument on April 10, 1978, the Ninth Circuit requested that the parties and the *amici* file supplemental briefs addressed to two questions: (1) whether the order appealed from was a final order within the meaning of Section 106(a), and (2) whether any judicial forum has jurisdiction to resolve Chadha's constitutional questions, assuming the court lacks jurisdiction under Section 106(a). Again, the INS and Chadha displayed no differences in answering those questions.

(c) Section 244(c)(2) is functionally independent and severable from the rest of Section 244. J.S.App.A, pp. 13a–16a.

(d) Chadha's claim that Section 244(c)(2) violates the separation of powers doctrine was held not to present a nonjusticiable political question. The separation of powers doctrine was held not to be textually committed to any one branch. And, said the court, since Chadha suffers injury due to the operation of a statute he claims violates the separation of powers doctrine, this type of claim is subject to judicially manageable standards. J.S.App.A, pp. 20a–22a.

(e) Chadha's claim was held to have the necessary adverseness, despite the fact that the INS has agreed that Section 244(c)(2) is unconstitutional. "Here Chadha has asserted a concrete controversy, and our decision will have real meaning; if we rule for Chadha, he will not be deported; if we uphold section 244(c)(2), the INS will execute its order and deport him." J.S.App.A, pp. 22a–23a. Moreover, the court added, courts often adjudicate cases in which legal or factual matters are conceded.

(f) The court held, in a footnote, that the fact that Chadha had recently married an American citizen did not make the case moot. Not even the fact that he could obtain relief through an immediate relative petition would relieve Chadha of significant collateral detriment, i.e., he would have to wait longer in order to be eligible for citizenship status, since he could not gain permanent resident status until and unless that immediate relative petition had been granted. The court then proceeded to grant Chadha certain relief he had not requested; it determined that Chadha's status as a legal resident "will have commenced when he received the initial grant of administrative suspension [on June 25, 1974]." J.S.App.A., pp. 17a–18a, n. 6.

(g) On the constitutional merits, the court held that the Section 244(c)(2) mechanism violates the constitutional doctrine of separation of powers, since it is a prohibited legislative intrusion upon the Executive and Judicial Branches. Congress, in short, has interfered with an essential Executive function of enforcing the Immigration and Nationality Act on a case-by-case basis. And Congress, by assuming the task of correcting misapplications of the law and thereby rendering ineffective all judicial interpretations, has interfered with the basic Judicial function. J.S.App.A, pp. 24a–63a.

(h) Finally, the court ordered the following relief (J.S. App. A, p. 63a):

> The decision by the Attorney General to stay deportation is deemed final. The deportation proceedings are deemed cancelled within the meaning of section 244(d) of the Immigration and Nationality Act, and the Attorney General is ordered to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives. It is so ordered.

The court's accompanying judgment, however, provided simply that "it is now here ordered and adjudged by this Court, that the deportation proceedings of the I&NS in this Cause be, and hereby is cancelled." See Senate petition for certiorari, Appendix K, p. 84a.

REASONS FOR GRANTING THE WRIT

As the Solicitor General has told this Court in No. 80–1832, the Ninth Circuit's decision "presents constitutional issues of the most fundamental nature regarding the distribution of powers among the branches of the federal government and the manner in which those powers may be exercised." J.S. at 11.

But the answers given by the Ninth Circuit do not comport with the high calling of these issues. The answers will have an unsettling effect not only on the administration of the Immigration and Nationality Act but also on the future course of relationships between the Legislative and Executive Branches. The decision below does indeed signal a profound shift in what the Solicitor General terms "the distribution of powers among the branches of the federal government." In a nutshell, the court has conferred upon the Executive, at the expense of the Legislature, virtually unlimited power to determine how the laws of the United States shall be executed and implemented.

Consider what the decision below means in terms of implementing the Immigration and Nationality Act. Historically, as the Senate's petition for certiorari points out, the Congress has refused to assign the Attorney General the function of finally determining which illegal or deportable aliens should be allowed to remain permanently in the United States. Section 244(c)(2) was carefully structured to retain that sovereign function in the Congress, which has acted upon recommendations from the Attorney General in the form of "suspensions" of deportation.

But, under the Ninth Circuit's ruling, the Congress is constitutionally proscribed from calling upon the Attorney General in this manner to aid in the execution of Congress's great power over aliens. The Attorney General must now be given, as a constitutional proposition, total power to implement all aspects of Section 244 suspension applications; he alone is to have power to cancel deportation and alter the status of the deportable alien. The Executive's power of implementation has been deemed supreme. Congress cannot participate in the execution of its own inherent power over deportation. Not even the courts will have occasion to review any abuses in the grant of relief by the Attorney General, for who will be aggrieved?

Section 244(c)(2) has long been an example of "the inherent necessities of the governmental co-ordination," *Hampton & Co.* v. *United States,* 276 U.S. 394, 406 (1928), that has marked modern federal government. Congress has frequently found it wise to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation. And Congress has frequently found it appropriate, particularly in areas of its own sovereign legislative powers, to supervise and to oversee and in some cases to finalize the coordinated Executive functions.

But the Ninth Circuit's separation philosophy would ban such experiments in inter-Branch coordination. The Congress would largely be confined to its Article I, Section 7, task of enacting new laws. The Executive, having been assigned the task of faithfully executing the laws, would be given wide-ranging authority to execute Congressional statutes without legislative restraint or oversight. In the Ninth Circuit's world of separate governmental functions, there would be that which this Court warned against in *Buckley* v. *Valeo,* 424 U.S. 1, 121 (1976), that "hermetic sealing off of the three branches of Government from one another [which] would preclude the establishment of a Nation capable of governing itself effectively."

Underlying this unwholesome view of the separation of powers doctrine is a misapprehension of the role of Congress in executing and dividing the various powers of government not specifically vested by the Constitution in one Branch only. Apart from a few specific and implied executive and judicial powers, it is the Congress—operating under the Necessary and Proper Clause—that determines not only how its own vested powers shall be executed but how and under what conditions the Executive and Judicial Branches shall execute theirs. That is basically how the Necessary and Proper Clause operates in its horizontal aspect, i.e., the part of the Clause giving Congress the power to make laws necessary and proper to carry into execution all other powers vested in the Government, or any department or officer thereof.[8] That is one of the analytical heritages of John Marshall's ruling in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 159, 206 (1819).

The Ninth Circuit effectively disregarded both the vertical and the horizontal effects of this Clause in assessing the validity of Section 244(c)(2). It refused to analyze or discuss the "necessary and proper" underpinning of Section 244(c)(2) in the light of a generalized separation of powers assault. That analytical failure not only devalued the separation doctrine but brought its decision into direct conflict with the "necessary and proper" approach of the Court of Claims in *Atkins* v. *United States*, 556 F.2d 1028, 1057-71 (Ct. Cls. 1977), *cert. denied*, 434 U.S. 1009 (1978). See also *Pressler* v. *Simon*, 428 F.Supp. 302

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[8] See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 Ohio State L. J. 788 (1975).

(D.D.C. 3-judge court, 1976), *aff'd sub nom. Pressler* v. *Blumenthal*, 434 U.S. 1028 (1978).

Atkins held constitutional the so-called "one-House veto" provision of the Salary Act, under which either House could disapprove a Presidential recommendation that judicial salaries be increased. In so ruling, *Atkins* rejected precisely the same kind of generalized separation of powers argument that is advanced in the instant case. The *Atkins* court observed, and we believe correctly, that Congress in the Salary Act was exercising both the vertical and the horizontal aspects of its "necessary and proper" power: (1) vertically, it was exercising its vested function to fix judicial salaries; (2) horizontally, in the court's words, "Whatever power the President exercises under the Salary Act, comes not from article II but from the delegation of Congress pursuant to the necessary and proper clause." 556 F.2d at 1069. The court thus disassembled the separation of powers doctrine argument in these terms (556 F.2d at 1068):

> Unless Congress invades a power specifically granted to the President in the Constitution, such as the power of appointment, or fails to provide guidelines, no separation-of-powers problem arises from such a delegation. Moreover, when Congress delegates authority of the kind we have here to a member of the executive branch, the delegation does not convert the authority granted into an irrevocable executive power, because in exercising the delegated functions, the executive officer merely acts as an agent of the legislative branch of the Government. . . . it may be observed that legislation is itself a form of supervision. Congress has two roles: initial formulation of policy and supervision. The only pertinent question is in

> what manner Congress can oversee. In this case, whether the answer is by full-fledged statute or by one-House veto, there would be neither a violation of the separation-of-powers principle nor an invalid intrusion on executive power since the pay-setting function is basically legislative in character and embodies no substantial element of, or incursion into, the administration, enforcement, or execution of the laws.

The House of Representatives respectfully suggests that the Ninth Circuit's analysis of Section 244(c)(2) is diametrically opposed to the Court of Claims' "necessary and proper" analysis of the Salary Act provision. Had the Ninth Circuit followed the ***Atkins*** approach, which was grounded in ***McCulloch*** v. ***Maryland***, it would have recognized that: (1) in enacting Section 244(c)(2), Congress was providing a necessary and proper means for exercising its vested sovereign power over aliens and deportation, that is, it was utilizing the vertical aspect of the Clause; (2) in providing that the Attorney General shall perform certain "suspension" functions under Section 244, Congress was delegating those functions to him pursuant to the horizontal sweep of the Clause. Those functions, in other words, came not from Article II executive power but from a "necessary and proper" delegation. If that is so, the separation of powers criticism of Section 244(c)(2) evaporates. And the same analysis disposes of any claimed invasion of judicial functions.

The House is well aware of the reluctance of this Court to decide great issues of constitutional law, particularly those that affect the very structure of the federal government, unless the necessities of litigation so dictate. The House accordingly directs the Court's attention to several matters of a threshold nature that were resolved by the Ninth Circuit, any one of which might be sufficient to dispose of this case without reaching the constitutional issues. Since neither of the original parties to the litigation seems disposed to advance these matters before the Court, they are set forth here rather summarily. Both the House and the Senate are prepared to discuss these matters more thoroughly upon fuller review of the decision below.

(1) Did the Ninth Circuit have jurisdiction to resolve the constitutionality of Section 244(c)(2) in the context of a Section 106(a) review of a final order of deportation made "pursuant to administrative proceedings"? The Ninth Circuit's theory was that a final order includes all matters on which its validity is dependent. But that seems questionable. The respondent Chadha at all times has conceded that the deportation order was valid under Section 241(a)(2). Section 244(c)(2) deals not with the validity of deportation orders but with entirely different petitions for discretionary relief from deportation orders. The difficulty with invoking Section 106(a) to review the constitutionality of Section 244(c)(2) is that the court of appeals is confined to the administrative record regarding deportation and suspension; there is no opportunity to develop a constitutional fact record concerning the use and justification of the legislative review technique.

(2) Did Chadha have standing to protest the validity of Section 244(c)(2)? The Ninth Circuit found standing on the dubious theory that Chadha's injury, his threatened deportation, was traceable to the operation of Section 244(c)(2). But that is an tenable as saying that the obligation to serve a valid prison sentence is traceable to the operation of a pardon statute, under which a pardon was refused the prisoner. Moreover, there appears to be no nexus

here between the claimed injury and the claimed illegal act of the House of Representatives in disapproving a change in Chadha's deportable status. Nor is there any apparent nexus between Chadha's deportable status and the constitutional separation of powers doctrine upon which he relies so exclusively. Cf. *Flast* v. *Cohen*, 392 U.S. 83 (1942).

(3) Does the fact that both parties agreed and argued that Section 244(c)(2) is unconstitutional drain the proceeding of an essential case or controversy requirement, that of adverseness? The motion of the House of Representatives to dismiss the appeal of the Immigration and Naturalization Service in No. 80-1832 discusses in detail why the Ninth Circuit's negative answer to that question seems in error. Suffice it here to say that the court failed to address or distinguish this Court's holding in *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 47-48 (1971), that where both litigants desire precisely the same result on a constitutional issue there is "no case or controversy within the meaning of Art. III of the Constitution."

(4) Does this proceeding become moot when the deportable alien becomes eligible, as by marriage to an American citizen, to seek another avenue of relief from the threatened deportation, but knowingly declines to take that route? This appears to be a novel point in the law of mootness, there being no direct precedent. It deserves further exploration.

(5) Does the claim that Section 244(c)(2) violates the separation of powers doctrine implicate the "political question" doctrine? The Ninth Circuit said "no" inasmuch as the separation of powers doctrine is not textually committed to any one branch. But the problem is not that simple. Here a very general separation of powers doctrine is being applied in the con-

text of an exercise by Congress of its vast powers under the Necessary and Proper Clause. What may be "necessary" or "proper" for purposes of executing those powers would seem to be matters textually committed exclusively to the Congress, as John Marshall said so long ago, at least where the alleged separation violation is not directed to some function specifically delegated by the Constitution to the President. Cf. *Buckley* v. *Valeo*, 424 U.S. at 135, where the specific appointment powers of the President were implicated.

(6) Is Section 244(c)(2) so severable from the remainder of Section 244 that a ruling that Section 244 (c)(2) is invalid would leave the remainder still effective, or is it evident that Congress would not have enacted Section 244 without the provisions of Section 244(c)(2)? The House suggests that the Ninth Circuit, in holding Section 244(c)(2) severable, simply misread the long legislative background of this important provision. The House also suggests that the Ninth Circuit, in purporting to find some authority outside Section 244(c) (2) for cancelling deportation and altering the status of a deportable alien, misread the plain words of Section 244(c)(2) and the other provisions of Section 244. The result appears to be an emasculation of Section 244, contrary to the long standing intent of Congress. And most distressing of all, this result seems to have been achieved through a series of judicial decrees and "deemings"—which reach their peak in the last paragraph of the Ninth Circuit's opinion. See J.S.App.A, p. 63a, and p. 16, *supra*.

CONCLUSION

For the first time in the history of the American government, the Congress of the United States has been forced to intervene in judicial proceedings in order to protest before this Court an assault upon its legislative prerogatives by another branch of government. This is not a happy occasion. Neither the House nor the Senate is a litigating body. But they have no alternative when first the Executive Branch and now the Judicial Branch have mounted a serious offensive against the exercise by Congress of its vested powers under the Necessary and Proper Clause.

Both the House and the Senate are confident that this Court will take appropriate steps to preserve and protect our tripartite form of government.

Respectfully submitted.

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JUNE 1981.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 1, of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 7, Clauses 2 and 3, of the United States Constitution provide in pertinent parts:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. . . .
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

3. Article I, Section 8, of the United States Constitution provides in pertinent parts:

> The Congress shall have Power * * *
>
> *   *   *   *   *
>
> To establish a uniform Rule of Naturalization, * * *
>
> *   *   *   *   *
>
> —And
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

4. Article II, Section 1, of the United States Constitution provides in pertinent part:

> The executive Power shall be vested in a President of the United States of America.

5. Article II, Section 3, of the United States Constitution provides in pertinent part:

> * * * he shall take Care that the Laws be faithfully executed, * * *

6. Section 244(c)(1) and (2) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1254(c)(1) and (2), provide:

> (c) Fulfillment of requirements of subsection (a); report to Congress
>
> (1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of the law shall be reported to the Congress with the reasons for

such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of a alien specified in paragraph (1) of subsection (a) of this section—

> if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

7. Section 106(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1105a(a), provides in pertinent part:

> The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252 (b) of this title or comparable provisions of any prior Act, * * *

8. Other pertinent provisions of Section 244 and other sections of the Immigration and Nationality Act of 1952 are set forth in Appendix J of the INS jurisdictional statement filed in No. 80–1832, pp. 79a–83a, and in Appendix L of the Senate's petition for certiorari in this case.

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Nos. 80-2170 and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2170

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

No. 80-2171

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

These petitions for a writ of certiorari seek review of the court of appeals' holding that the "one-House veto" provision in Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), is unconstitutional. The Immigration and Naturalization Service has filed an appeal (No. 80-1832) that presents the identical question. Although the House and Senate have moved to dismiss the INS's appeal on jurisdictional grounds, these petitions indicate that the Congress agrees with our submission in the Jurisdictional Statement in No. 80-1832 that the fundamental constitutional issue of separation of powers presented by the case warrants review by this Court. The House also acknowledges (No. 80-2170 Pet. 19) that the decision below conflicts with *Atkins* v. *United States*, 556 F. 2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

INS's appeal in No. 80-1832 brings the "whole case" before the Court, not just the constitutionality of Section 244(c)(2). *Williams* v. *Zbaraz*, 448 U.S. 358, 367-368 & n.10 (1980); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975). The House and Senate therefore may advance on the government's appeal the same arguments they raise in their certiorari petitions, including that the court of appeals was without jurisdiction in this case.[1] Moreover, because INS's appeal in No. 80-1832 falls within this Court's obligatory jurisdiction under 28 U.S.C. 1252, that appeal is possessed of an inherent priority that petitions for a writ of certiorari do not share.

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[1] As we argued in the Jurisdictional Statement in No. 80-1832 (at 6-7 n.6), the court of appeals correctly rejected the House and Senate's contention that the court of appeals did not have jurisdiction of the case under 8 U.S.C. 1105a(a), that respondent Chadha had no standing to challenge the constitutionality of Section 244(c)(2), that the case presents a nonjusticiable political question, and that there is no Article III case or controversy because INS has taken the position that Section 244(c)(2) is unconstitutional. See J.S. App. 12a-24a; see also Reply Brief for the Appellant in No. 80-1832. That discussion need not be repeated here.

Moreover, as we pointed out in the Jurisdictional Statement in No. 80-1832 (at 6-7 n.6), Chadha's marriage to a United States citizen in August 1980—3-1/2 years after the deportation order was affirmed by the Board of Immigration Appeals (BIA)—does not moot the case. That marriage could provide a means for petitioner to become a permanent resident alien only if his wife filed an immediate relative petition (8 U.S.C. 1154(a); 8 C.F.R. 204.1(a)), which she has not done. In addition, even if such a petition were filed and granted by INS, the date of Chadha's eligibility for citizenship would run from the date *in the future* when he became a permanent resident alien in this manner, not from the 1974 date of the decision of the immigration judge suspending

Accordingly, we suggest that the Court hold these subsequently-filed petitions pending a decision on INS's appeal in No. 80-1832. If the Court later should conclude, even after oral argument, that it does not have jurisdiction under 28 U.S.C. 1252 of INS's appeal in No. 80-1832, the Court could grant the House and Senate's petitions at that time and dispose of the issue presented on the basis of those petitions.

Respectfully submitted.

REX E. LEE
Solicitor General

AUGUST 1981

Chadha's deportation, as under the court of appeals' decision. He therefore retains a substantial stake in preserving the decision below. J.S. App. 17a-18a n.6.

For similar reasons, the passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, some three years after the BIA affirmed the order requiring Chadha's deportation, does not, contrary to the Senate's contention (Pet. 13-14), moot the case or require a remand to the court of appeals. This Act, even if it were held to be applicable to a deportation order issued three years earlier, would not provide a basis for Chadha to acquire permanent resident alien status as of 1974 and/or present eligibility for citizenship (based on the passage of five years since that time), as would the court of appeals' decision. See Section 209, 94 Stat. 105, (to be codified at 8 U.S.C. 1159).

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Nos. 80-1832, 80-2170, 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT
v.
JAGDISH RAI CHADHA, ET AL., APPELLEES

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER
v.
IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

UNITED STATES SENATE, PETITIONER
v.
IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED STATES HOUSE OF REPRESENTATIVES, APPELLEE-PETITIONER

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QUESTIONS PRESENTED*

1. Whether the Congressional review procedures set forth in Section 244(c)(2) of the Immigration and Nationality Act of 1952 constitute "necessary and proper" means of executing the sovereign legislative power of Congress over the status and deportation of aliens, and is consistent with the letter and spirit of other provisions of the Constitution, particularly the general separation of powers doctrine.

2. Whether the Immigration and Naturalization Service, as one of the prevailing parties in a federal court proceeding wherein an Act of Congress being administered by the Service is held unconstitutional, has standing to appeal to this Court under 28 U.S.C. § 1252.

3. Whether, in a proceeding under Section 106(a) of the Immigration and Nationality Act to review a final order of deportation, a court of appeals has jurisdiction to review the constitutionality of Section 244(c)(2) of the Act, which establishes Congressional procedures for final determination whether, upon the recommendation of the Attorney General, the status of an otherwise deportable alien should be changed to that of a permanent resident alien and the deportation proceeding cancelled.

4. Whether a concededly deportable alien has standing, in a Section 106(a) review proceeding, to challenge the constitutionality of Section 244(c)(2), pursuant to which the House of Representatives disapproved by resolution "the granting of permanent residence in the United States" to that alien.

5. Whether such a Section 106(a) review proceeding constitutes a constitutional case or controversy where (a) both

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* The order of presenting these Questions differs from the order in the petition for certiorari in No. 80-2171. Question No. 2 herein has been added in response to the Court's order in No. 80-1832 postponing the question of jurisdiction to the hearing on the merits.

the deportable alien and the Immigration and Naturalization Service, the only two parties to the proceeding, are in total agreement that Section 244(c)(2) is unconstitutional and that the deportation proceeding should be cancelled, and (b) the deportable alien declines to seek other available relief from deportation, including the right to apply for permanent resident status following his recent marriage to an American citizen.

6. Whether the propriety of the Section 244(c)(2) procedures for Congressional review of recommended adjustments of the status of deportable aliens is a "political question."

7. Whether Section 244(c)(2) is severable from the remainder of Section 244 of the Act, there being no statutory authorization to adjust the deportable alien's status and to cancel the deportation in the absence of favorable Congressional action pursuant to Section 244(c)(2).

PARTIES TO PROCEEDING BELOW

Original parties before the United States Court of Appeals for the Ninth Circuit: (1) Jagdish Rai Chadha, herein an appellee in No. 80–1832 and a respondent in Nos. 80–2170 and 80–2171; (2) the Immigration and Naturalization Service, herein the appellant in No. 80–1832 and a respondent in Nos. 80–2170 and 80–2171.

Amici curiae before the Ninth Circuit, by invitation of the court: (1) the United States House of Representatives; (2) the United States Senate.

Intervenors after judgment of the Ninth Circuit: (1) the United States House of Representatives, herein an appellee in No. 80–1832 and the petitioner in No. 80–2170; (2) the United States Senate, herein an appellee in No. 80–1832 and the petitioner in No. 80–2171.

Authorization to intervene in the Ninth Circuit on behalf of the House of Representatives was granted to the Speaker of the House by H. Res. 49, 97th Cong., 1st Sess., unanimously agreed to on January 29, 1981, 127 Cong. Rec. H 260 (Jan. 29, 1981, daily ed.). The full text of H. Res. 49 is set forth in the petition for certiorari in No. 80–2170, pp. III–IV.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 80-1832, 80-2170, 80-2171

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT,

v.

JAGDISH RAI CHADHA, ET AL., APPELLEES

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

UNITED STATES SENATE, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED STATES HOUSE OF REPRESENTATIVES, APPELLEE-PETITIONER

The appeal in No. 80-1832 and the writs of certiorari in Nos. 80-2170 and 80-2171 all stem from the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 22, 1980, in the proceeding there captioned *Jagdish Rai Chadha* v. *Immigration and Naturalization Service,* C.A. 9 No. 77-1702. This Court has consolidated the appeal and the two certiorari cases for briefing and argument purposes.

The United States House of Representatives, acting through the Speaker of the House pursuant to H. Res. 49, 97th Cong., 1st Sess. (see petition for certiorari in No. 80–2170, pp. iii–iv). respectfully prays that this Court either vacate or reverse the judgment of the Ninth Circuit for the reasons expressed in this brief.

OPINIONS BELOW

The opinion of the Ninth Circuit, dated December 22, 1980, is reported at 634 F.2d 408. It is reprinted in Appendix A, pp. 1a–63a, of the jurisdictional statement filed by the Immigration and Naturalization Service in No. 80–1832.

The unreported administrative decisions are reprinted in the appendices to the jurisdictional statement in No. 80–1832, as well as in the Joint Appendix before this Court. The two decisions of the INS immigration judge appear in J.S. App. B, pp. 64a–66a, and in J.S. App. D, pp. 70a–71a. The opinion of the Board of Immigration Appeals appears in J.S. App. E, pp. 72a–73a. The respective opinions appear in the Joint Appendix at App. 46, 52 and 55.

JURISDICTION

Jagdish Rai Chadha, appellee-respondent herein, instituted this proceeding in the Ninth Circuit, pursuant to Section 106 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1105a(a), to review a final order of deportation issued against him by the Immigration and Naturalization Service. The judgment of the Ninth Circuit, ordering "that the deportation proceedings of the I&NS in this Cause be, and hereby is cancelled," was entered on December 22, 1980. The judgment is reprinted in the Senate's petition for certiorari in No. 80–2171, Appendix K, p. 84a.

In the appeal docketed in this Court as No. 80–1832, the Immigration and Naturalization Service had filed a notice of appeal on January 19, 1981. J.S.App.F, p. 74a.[1] The appeal was duly docketed on May 1, 1981, the jurisdiction of this Court being invoked under 28 U.S.C. § 1252. The House and the Senate, as appellees in the appeal, filed motions to dismiss the appeal on jurisdictional grounds. On October 5, 1981, the Court ordered that "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits in No. 80–1832." The question of jurisdiction is discussed further in this brief at pp. 15–18, *infra.*

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[1] Citations herein to "App. ——" refer to the printed Appendix before this Court. Citations herein to "J.S.App. ——" are to the various appendices in the INS jurisdictional statement before this Court in No. 80–1832.

In the two cases now here on certiorari, Nos. 80–2170 and 80–2171, the two petitioners—the United States House of Representatives and the United States Senate—had participated in the Ninth Circuit proceedings, by invitation, as *amici curiae.* Following the decision of the court, the House and Senate on February 3, 1981, moved to intervene in those proceedings in order (1) to petition for rehearing and to suggest a rehearing *en banc,* and (2) to be able to petition this Court for writs of certiorari. On March 10, 1981, the Ninth Circuit granted the motions to intervene and ordered that the timely filed petition for rehearing *en banc* be circulated to the active judges of the court. J.S.App.G, p. 75a. On March 25, 1981, the Ninth Circuit denied the joint petition for rehearing, and rejected the suggestion for a rehearing *en banc.* J.S.App.H, p. 76a.

On June 22, 1981, less than 90 days after the denial of rehearing, the House and the Senate filed petitions for certiorari in Nos. 80–2170 and 80–2171. On October 5, 1981, the Court granted both petitions. The jurisdiction of the Court has been invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In the Appendix hereto, p. 1a, *infra,* are contained the various constitutional and statutory provisions the House deems pertinent to this case. Those provisions are:

1. Article I, Section 1, of the Constitution.
2. Article I, Section 7, Clauses 2 and 3, of the Constitution.
3. Portions of Article I, Section 8, of the Constitution.
4. Article II, Section 1, of the Constitution.
5. A portion of Article II, Section 3, of the Constitution.

6. Section 244(c)(1) and (2) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1254(c)(1) and (2).

7. A portion of Section 106(a) of that Act, 8 U.S.C. § 1105a(a).

8. 28 U.S.C. § 1252.

STATEMENT OF THE CASE

The events of this case, largely procedural in nature, may be summarized in four statutory categories: (a) the Section 242(b) deportation proceeding; (b) the Section 244(a)(1) suspension application; (c) the Section 244(c) congressional review proceeding; and (d) the Section 106(a) judicial review proceeding.

A. THE SECTION 242(b) DEPORTATION PROCEEDING

Section 241(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(2), directs the Attorney General to deport any alien "who is in the United States in violation of this chapter." Pursuant to that direction, the Immigration and Naturalization Service (hereinafter "INS") in 1973 instituted deportation proceedings under Section 242(b) of the Act by issuing an order to show cause why Jagdish Rai Chadha, an appellee and respondent herein, should not be deported on the charge that,

> . . . after admission as a nonimmigrant [student] under Section 101(a)(15) of said Act you have remained in the United States for a longer time than permitted. (App. 6).[2]

A hearing on the show cause order was held before an INS immigration judge on January 11, 1974, App. 7. At the hearing. Chadha's counsel conceded "that he is deportable as charged."

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[2] Chadha, a native of Kenya and now a citizen and subject of Great Britain, was originally admitted to the United States in 1966 as a nonimmigrant student, under Section 101(a)(15)(J), for a temporary period only. After extensions, that period finally expired on June 30, 1972. App. 9. Having overstayed the statutory time limit, Chadha was and is "in the United States" in violation of the Act and hence is deportable under Section 241(a)(2).

App. 10. In accord with that concession, the INS immigration judge concluded in his June 25, 1974, decision that Chadha "is deportable as charged." J.S.App. B, 65a. That concession still stands. His deportability was reaffirmed in the final deportation order issued in 1976. See J.S.App.D, 70a. The Board of Immigration Appeals also acknowledged Chadha's deportability when it dismissed his appeal from the final deportation order in February of 1977. J.S.App.E, 72a–73a.[3]

B. THE SECTION 244(c)(1) SUSPENSION APPLICATION

Upon the oral concession of deportability at the January 11 deportation hearing, Chadha's counsel requested an adjournment to prepare and submit a written application for "suspension of deportation" pursuant to Section 244(c)(1) of the Act. App. 10–11. Section 244(a)(1) provides that, upon application of a deportable alien like Chadha, the Attorney General "may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence," if the alien *inter alia* is

> . . . a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.[4]

Chadha's written application for "suspension of deportation" was premised on the assertion that he was "unable to return to either country of birth or nationality [Kenya or Great Britain] because of immigration laws and ethnic background." App. 35.

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[3] The Ninth Circuit's opinion recited that "Chadha conceded his deportable status" at the deportation hearing. J.S.App.A, 2a. In *Foti* v. *INS*, 375 U.S. 217, 227 n. 13 (1963), this Court noted that deportability is conceded in about 80% of the cases.

[4] Under Section 244(a)(1), the alien applicant must also have been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of the application, and must prove that during all of such period "he was and is a person of good moral character."

At the subsequent hearing on the suspension application, held before the same INS immigration judge on February 7, 1974, Chadha rested his "extreme hardship" claim mainly on his self-serving statements that (a) neither Kenya nor Great Britain "want me or people of my ethnic background," App. 37, (b) "I do not want to subject myself to any economic, racial or political hostilities," App. 37, (c) he had resided in the United States for seven years and considered it to be "my home," App. 37, (d) he was "well adjusted to the entire American philosophy of living," App. 37, and (e) "most important I am engaged to an American citizen . . . and we contemplate getting married sometime in the future," App. 38.[5]

Evidence was also submitted at this February 7 hearing that indicated that he would need work permits or employment vouchers to be able to work in either Kenya or the United Kingdom, which might take some time to obtain. App. 43–45.

At the end of the suspension hearing under Section 244(c)(1), the INS judge queried Chadha further about his prospective marriage "because your case is not a particularly good one for suspension of deportation," whereas "if you got married you would have no difficulty in having your status changed." App. 29. The judge then made the following oral finding:

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[5] A supporting affidavit, dated February 7, 1974, was filed by one Meaveen Sague, a citizen of the United States, who swore that "We are engaged to be married, but have not as yet set a date." App. 41.

Later, in November of 1980, Chadha's counsel filed a "Memorandum with respect to current status of petitioner Jagdish Rai Chadha" in the Ninth Circuit. The court was advised that "on August 10, 1980, petitioner married Theresa Lorentz who is a citizen of the United States." The memorandum also asserted: "Because petitioner is now married to an American citizen, he is eligible to have an immediate relative visa petition filed on his behalf and to apply for adjustment of his status to permanent resident alien. (9 CFR 204.1; 8 USC 1151(b)). Neither a petition nor an application has yet been filed and there is no present intention to do so. While it is likely the petitioner would have his status adjusted, if he sought such relief, it is never certain. Thus, at least until there was an actual adjustment of his status, which probably would not take place for at least eight months and perhaps as much as a year, the case cannot be moot."

See footnote 6 of the Ninth Circuit opinion, J.S.App.A, 17a–18a.

> I'm unable to find on the basis of the evidence submitted that Mr. Chadha would suffer the extreme hardship required by the statute. Accordingly, I am going to deny his application for suspension of deportation. Now as an alternative you have asked for asylum on his behalf. . . . All right, I won't render my decision now. I'm going to adjourn the case so that you may proceed with your application for asylum. (App. 30).

The record indicates that immediately after that finding the hearing "is adjourned." App. 31. Without any indication of how much time elapsed, the next line in the record indicates that the hearing "is resumed." App. 31. The INS immigration judge immediately stated, without elaboration, that

> . . . on further thought I think I might be inclined to grant this application for suspension of deportation. Accordingly, I am going to ask you to withdraw for the present your request for asylum in behalf of the respondent. . . . The hearing is closed. (App. 31–32).

On June 25, 1974, the INS immigration judge issued his formal decision granting Chadha's application for suspension of deportation. J.S.App.B, 64a–66a. Without mentioning his sudden change of mind at the February 7 hearing, the judge wrote:

> The respondent [Chadha] has established that it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation. He has stated that his deportation would result in a hardship to him because he has formed strong personal ties with friends and because it is questionable whether he would be able to utilize his education in other countries.
>
> Because of his race and the difficulties he would face by reason thereof, I am satisfied that his deportation would result in an extreme hardship to him. I am also of the opinion that because of this circumstance, his application should be granted as a matter of administrative discretion. (App. 47–48).

In accordance with the Section 244 statutory scheme, the INS immigration judge's decision of June 25 did not order that the deportation proceedings be cancelled. Rather, the decision recognized that a suspension is no more than a suspension, an order that recognized that the suspension was conditional. The suspension order simply "suspended" the deportation under the provisions of Section 244(a)(1), and directed that cancellation await the action of Congress. If Congress took no action adverse to the suspension order, then and then only were the deportation proceedings to be cancelled and appropriate action taken to change Chadha's status pursuant to Section 244(d). On the other hand, the order specified that if Congress were to take action adverse to the suspension order "these proceedings shall be reopened upon notice to the respondent." App. 48. Chadha thus had full notice that the suspension order was temporary in nature, like a temporary injunction, pending further review and action by Congress as set forth in Section 244(c)(2) of the Act.

C. THE SECTION 244(C)(2) CONGRESSIONAL REVIEW PROCEEDING

A full report on Chadha's case, including the suspension decision of June 25, 1974, was made by INS to the Congress, pursuant to Section 244(c)(1). That section provides that if the Attorney General (who has delegated most of his authority to the INS) decides to suspend an alien's deportation—but not if he decides to deny the alien's application for suspension—"a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension." Such reports are to be submitted on the first day of each calendar month in which Congress is in session.

Congress thereafter considered Chadha's case in accordance with the procedures set forth in Section 244(c)(2). On the House side, the Judiciary Subcommittee on Immigration, Citizenship, and International Law made full inquiry into the record before the INS with respect to Chadha's eligibility under the law for suspension, as well as his eligibility for the ultimate relief of cancellation of deportation and a change in status to that of a permanent resident alien. Available in this review was the transcript of the suspension hearing in which the INS immigration judge decided first to deny the application, and then suddenly to grant it.

The House Subcommittee determined that Chadha should not be granted relief by way of granting him permanent residence status. The full Judiciary Committee, after due consideration, accepted the Subcommittee's recommendation. H. Res. 926 was thereupon prepared for submission to the House.

On December 16, 1975, the House unanimously adopted H. Res. 926. 121 Cong. Rec. 40800; J.S. App. C, 69a. The resolution stated that "the House of Representatives does not approve the granting of permanent residence in the United States to the [six] aliens hereinafter named [including Chadha], in which cases the Attorney General has submitted reports to the Congress pursuant to section 244(a)(1) of the Immigration and Nationality Act, as amended."

Significantly, H. Res. 926 does not purport to disapprove or "veto" the decision of the INS immigration judge to suspend Chadha's deportation pending congressional consideration of the matter. Rather, H. Res. 926 is an affirmative declaration by the House that it "does not approve the granting of permanent residence in the United States" to Chadha. As explained by Rep. Eilberg, Chairman of the Subcommittee on Immigration, it was the Committee's feeling in recommending H. Res. 926 that Chadha and the other named aliens did not meet the statutory requirements for relief from deportation, "particularly as it relates to hardship." J.S. App. C, 68a. Such a congressional determination is fully consistent with, and does not overturn, the INS action suspending deportation pending action by the Congress under Section 244(c)(2).

D. THE SECTION 106(a) JUDICIAL REVIEW PROCEEDING

The action of the House in adopting the resolution disapproving a change in Chadha's deportable status triggered the further provision of Section 244(c)(2) that if either House of Congress passes such a resolution "the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense . . ." The INS immigration judge accordingly reconvened the deportation hearing on August 4, 1976. App. 48. At that hearing, Chadha's counsel made no attempt to show why Chadha should not be deported; counsel also declined to apply for a grant of voluntary departure. The immigration judge accordingly entered a final and uncontested order that Chadha be deported to the United Kingdom "on the charge set forth in the [original] Order to Show Cause." App. 52; J.S.App.D, 70a–71a. This was the order that Chadha was later to appeal to the Ninth Circuit.

While making no claim at the reopened hearing that he was not deportable as charged, Chadha's counsel did move to terminate the deportation proceeding "on the grounds that Section 244(c)(2) of the Immigration and Nationality Act is unconstitutional in that it is in contravention to Article 1, Section 7, of the Constitution in that it's violative of the separation of powers doctrine." App. 49. The INS attorney responded that "The Service is obviously taking the position in this particular case that as this section is constitutional and Congress has the power to set conditions subsequent on the grant of suspension of deportation in this case, the approval or disapproval." App. 51. The immigration judge also commented that it

> . . . would seem to me that the whole suspension procedure is a package deal and if the Congressional review aspect is found unconstitutional it would follow that the whole section would become inoperative. . . .
>
> . . . But in any event, . . . as you know I have no authority to decide the constitutionality of statutes and if you don't apply for voluntary departure the only alternative I will have is to enter an order for the respondent's deportation. (App. 50).

The judge added, however, "that I agree with you that the Congressional review of a decision of the executive branch of the Government which I represent would be unconstitutional." App. 51.

Chadha renewed his attack on the validity of Section 244(c)(2) on his appeal to the Board of Immigration Appeals from the final order of deportation. The Board dismissed the appeal and affirmed the final deportation order. In its decision, dated February 11, 1977, the Board found the constitutional argument to be "without merit," citing its own prior decision in *Matter of Santana*, 13 I&N Dec. 362 (BIA 1969), holding that

"Congress has the absolute and unqualified power to prescribe the conditions under which an alien may enter the United States." The Board also stated that it had "no power to declare unconstitutional an act of Congress." J.S.App.E, 72a–73a.

Thereafter, on March 24, 1977, Chadha filed in the Ninth Circuit a petition for review of the final order of deportation. He invoked Section 106(a) of the Act, 8 U.S.C. § 1105a(a), which provides for "judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act."

Chadha's petition for review in no way questioned the statutory or constitutional propriety of the final deportation order. Nor was any complaint made that he had proved "extreme hardship" and that the House had acted arbitrarily in denying him relief on that basis. There was not even a contention that Chadha's own rights or privileges had been infringed in any way. The sole contention, the contention that was to set the entire course of the appellate proceeding, was that the Section 244(c)(2) procedure exceeded the legislative powers of Congress and invaded functions vested by the Constitution in the Executive Branch.

Chadha's brief on the merits in the Ninth Circuit made the same single-minded claim that the Section 244(c)(2) procedure invaded the President's vested executive functions, and was thus violative of the separation of powers doctrine. The four points in the brief were: (1) neither the power to regulate naturalization nor the Necessary and Proper Clause empowers Congress to act in contravention of other constitutional provisions; (2) the "Congressional veto" violates the separation of powers doctrine; (3) the "Congressional veto" deprives the President of the opportunity to exercise his veto power under Article I, Section 7; and (4) the "one-House veto" provision violates the requirement of a bicameral Legislature.

The INS responded in the Ninth Circuit with a brief in total agreement with Chadha's constitutional contentions, while adding a few refinements thereto. Three points were made in this brief: (1) Section 244(c)(2) violates the Article I procedures for enactment of the laws of the United States; (2) Section 244 (c)(2) is an intrusion into executive and judicial powers and functions, in violation of the separation of powers doctrine; and (3) Section 244(c)(2) is severable from other provisions of the Act. The INS brief registered no complaint about Chadha's standing to raise such a separation of powers claim on behalf of the Executive. Nor did the brief attempt to find any prudential, jurisdictional or other reason for not resolving this major constitutional confrontation among the three Branches in the context of Chadha's concededly valid deportation order.

In addition to the mutuality of contentions as to the invalidity of Section 244(c)(2), Chadha and the INS were in total agreement as to the relief to be granted by the Ninth Circuit. As the INS briefs repeatedly told the Ninth Circuit, "this Court should set aside the [INS] order for petitioner's deportation." Main Brief, at 36; Reply Brief, at 13, 18.

It thus became apparent that there was no adverseness between the only two parties to the case as to the sole matter in issue, the constitutionality of Section 244(c)(2). The Ninth Circuit, perceiving that phenomenon, on November 11, 1977, addressed letters to the Vice President of the United States and the Speaker of the House of Representatives inviting them to file briefs *amici curiae* on behalf of the Senate and the House, respectively, advising the court of their views as to the constitutionality of Section 244(c)(2). The invitations were accepted, although with no intent to become formal parties to the court proceedings or to supply any adverseness that might be deemed necessary as between the parties to the case before the Ninth Circuit.

The two congressional *amici* proceeded to participate in the briefing and oral arguments before the Ninth Circuit. Both Chadha and the INS filed briefs in reply to the *amici* briefs filed by the House and Senate. And at the oral argument, counsel for Chadha and the INS were jointly aligned against counsel for the House and Senate.

In addition to arguing in defense of the constitutionality of Section 244(c)(2), the congressional *amici* urged various prudential, procedural and jurisdictional reasons why the difficult constitutional issues should not and need not be reached—reasons that neither of the parties had discussed in their main briefs. The Ninth Circuit rejected all such threshold contentions. And in this Court, the INS jurisdictional statement in No. 80–1832, at pp. 6–7, n. 6, expresses total satisfaction with the Ninth Circuit's disposition of these threshold matters. In so doing, the INS continues its unbroken string of differing not one whit from Chadha's position on any issue.

In addition to decreeing the foregoing relief from deportation, the relief that both Chadha and the INS had sought, the Ninth Circuit forged additional relief for Chadha that had not been requested, let alone litigated. In ruling in footnote 6 of the opinion, J.S.App.A, 17a–18a, that Chadha's recent marriage to an American citizen did not moot the case, the Ninth Circuit gratuitously added that Chadha's "status as a legal resident," under the court's disposition, "will have commenced when he received the initial grant of administrative suspension"; and since "Chadha's deportation was suspended in 1974, the five-year waiting period for citizenship has already expired, thus making Chadha [immediately] eligible to apply for naturalization."

Following this decision by the Ninth Circuit, the House and the Senate by resolutions determined to intervene to protest all aspects of the opinion and judgment. The Ninth Circuit granted the motions of these two bodies to intervene for the limited purposes of (1) protesting the Ninth Circuit's ruling by filing petitions for rehearing, plus suggestions of rehearing *en banc*, and (2) permitting the two Houses to appeal or file petitions for certiorari in this Court. Intervention was not sought or granted to invest the Ninth Circuit proceedings with any kind of party adverseness, or to establish any kind of a "case or controversy" not otherwise present in those proceedings. As stated by Representative Foley, in introducing H. Res. 49, such intervention was deemed necessary "if the position of the legislative branches is to be protected here." 127 Cong. Rec. H260 (Jan. 29, 1981, daily ed.).

Following the denial of rehearing by the Ninth Circuit on

March 25, 1981, J.S.App.H, 76a, the House and the Senate timely filed separate petitions for certiorari, Nos. 80–2170, 80–2171. The House and the Senate also appear here as appellees in the INS appeal, No. 80–1832.

On the basic constitutional issue, the Ninth Circuit held that the Section 244(c)(2) congressional review procedures violate the separation of powers doctrine, just as Chadha and the INS had argued. The court also accepted the additional INS argument that Section 244(c)(2) is severable; thus its invalidation does not void any other part of the statutory deportation and suspension scheme. In sum, this section was said to violate the separation of powers doctrine in two senses: (1) it interferes with the essential Executive function of enforcing the Immigration and Nationality Act on a case-by-case basis; and (2) it interferes with the basic Judicial function by giving to Congress the task of correcting misapplications of the law and thereby rendering ineffective all judicial interpretations of the statutory suspension standards.

Despite its holding that the invalidation of Section 244(c)(2) does not affect the life of the other suspension procedures in Section 244, the Ninth Circuit found it necessary to order the execution of those other procedures by its own judicial fiat, rather than by operation of Section 244 itself. Thus in the final paragraph of the opinion, J.S.App.A., 63a, the Ninth Circuit provided for the following relief:

> The decision by Attorney General to stay deportation is *deemed* final. The deportation proceedings are *deemed* cancelled within the meaning of section 244(d) of the Immigration and Nationality Act, and the Attorney General is *ordered* to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives. It is so *ordered.* [Emphasis added].

The court's accompanying judgment provided that "it is now here ordered and adjudged by this Court, that the deportation proceedings of the I&NS in this Cause be, and hereby is cancelled." See Senate petition for certiorari in No. 80-2171. App.K, 84a.

THE JURISDICTIONAL PROBLEM

The question of jurisdiction having been postponed in No. 80-1832, Rule 16.8 requires that the question be addressed at the outset of this brief. The House of Representatives, one of the appellees on that appeal, accordingly renews and reiterates all jurisdictional objections previously voiced in its motion to dismiss, and adds reflections upon the counterarguments advanced by the INS reply brief in No. 80-1832.

1. Now that the Court has taken jurisdiction over the entire case by granting certiorari in Nos. 80-2170 and 80-2171, it is unnecessary *to* take jurisdiction over the same case again by noting the INS appeal in No. 80-1832. The certiorari cases involve the identical issues and the same parties present in the appeal.

Dismissing the superfluous appeal would serve to advance the established rule of federal appellate practice that "a party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 333 (1980). Why create a dubious exception to that rule? Who can say what precedential repercussions might ensue under Section 1252 and other jurisdictional statutes if this prevailing party, the INS, is allowed to appeal?

2. The INS contention that it has satisfied all the "express requisites" for an appeal to this Court under Section 1252 (Reply Brief, 2) is no answer to the jurisdictional problem, i.e., whether INS has sufficient standing to invoke this Court's jurisdiction under Section 1252. Standing, of course, is a jurisdictional requirement superimposed upon the literal requirements of any statute authorizing an appeal. Section 1252 is no exception.

Standing to appeal connotes that the appellant is in fact aggrieved by some aspect of the judgment from which the appeal is taken. If the appellant has *no* grievance, if he was totally successful below, "this Court is without jurisdiction." *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 207 (1939). Such a putative appeal must be dismissed. See e.g., *Gunn* v. *University Committee*, 399 U.S. 383, 391 (1970).[6]

3. The INS seeks, however, to don the mantle of an "aggrieved party" by resort to what it calls "the common sense meaning" of that term. INS says it was "aggrieved" by the Ninth Circuit's order voiding the deportation of Chadha and enjoining further INS steps to deport him, actions INS "otherwise would take and that it theretofore had initiated." Reply Brief, 3.

But "common sense" reveals no such grievance. Had INS been fighting to preserve the deportation it had initiated, it would indeed have been aggrieved. But the INS willingly sacrificed the deportation order in order to secure an invalidation of Section 244(c)(2). It repeatedly asked the Ninth Circuit to relieve it of its statutory duty to deport Chadha and to "set aside the [INS] order for petitioner's deportation." INS Brief in Ninth Circuit, 36; INS Reply Brief in Ninth Circuit, 18. How can INS now say it is "aggrieved" by an injunctive order it fought so hard to obtain? What relief did INS seek and not obtain? And what portion of the Ninth Circuit's judgment would the "aggrieved" INS have this Court modify or reverse?

The "common sense" answer to those questions is that INS seeks nothing less than unqualified affirmance of the Ninth Circuit's judgment. The INS, like the appellee Chadha, was a prevailing party both as to the holding of unconstitutionality and the accompanying judgment.[7]

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[6] The only support cited by INS is *Williams* v. *Zbaraz*, 448 U.S. 358, 366–367 (1980), a case not in point. The Court there held that its jurisdiction over a § 1252 ppeal, where all the literal requirements of § 1252 are met, is not divested by the fact that the district court, from which the appeal is being taken, exceeded its jurisdiction under Article III.

See generally, C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure*, Vol. 15, § 3902 (1976).

[7] The INS suggests that Chadha himself might not be able to take a direct appeal under § 1252 because he was a plaintiff in whose favor the court below granted injunctive relief, whereas INS was in the position of a defendant against whom injunctive relief was granted. Reply Brief, 4. Such a distinction is meaningless in the unusual circumstances of this case. Both Chadha and the INS sought the kind of injunctive relief the Ninth Circuit ordered, and thus the relief was granted in favor of both.

4. The INS also suggests that Section 1252 confers a statutory kind of "grievance" upon it. INS argues that merely being an agency of the United States, an agency "that is a party to a case in which an Act of Congress it administers is held unconstitutional," is enough "to be aggrieved by that holding for purposes of taking an appeal." Reply Brief, 7. And in a final effort to turn its victory below into an appealable defeat, the INS points to "the cloud" its victory has "cast over the validity of the Act in the Nation as a whole." The Executive, we are told, "may be forced to take inconsistent positions in other judicial districts or circuits in the administration of the statute." *Id.*, 9. In effect, the INS is asking this Court to rescue it from the administrative chaos resulting from the constitutional torpedo INS directed at Section 244(c)(2).

All that the INS says with respect to its "aggrieved" statutory status makes sense when the federal agency has sought to defend the constitutionality of the statute it administers and thus is truly "aggrieved" by a holding of unconstitutionality. But in the context of this litigation, the argument comes with ill-grace. It is doubtful that the framers of Section 1252 ever contemplated, let alone intended, its use in the unique and extraordinary circumstances of this case. One of those unusual circumstances is the lack of any adverse parties in the proceeding below, both Chadha and INS uniting in attacking the constitutionality of Section 244(c)(2) and in seeking the same relief from the Ninth Circuit. More than that, the two parties before the Ninth Circuit had no controversy between them; the constitutional conflict, if any, was between the Executive and Legislative Branches, not between Chadha and the INS. Nor was there a controversy between Chadha and the Legislative Branch, for Chadha challenged Section 244(c)(2) solely in terms of its alleged inconsistency with the separation of powers doctrine. In a true sense, Chadha voluntarily instituted this constitutional confrontation between Branches and took the side of the Executive, making it possible for the Executive—acting through the INS pawn—to join forces with Chadha's claims.

The combination of these unique factors, discussed more fully hereinafter, makes this an unprecedented situation. Neither *United States* v. *Lovett*, 328 U.S. 303 (1946), nor any other case cited in the INS reply brief (see pp. 5–6) even remotely parallels this one. These factors also combine to make it difficult, and perhaps impossible, to describe the INS as an "aggrieved party," either in the statutory or "common sense" meaning of that term.

To assert jurisdiction over this Section 1252 appeal would be a most unfortunate precedent.

SUMMARY OF ARGUMENT

The Ninth Circuit, in a lengthy and somewhat confusing restatement of the separation of powers doctrine, has invalidated Section 244(c)(2) of the Immigration and Nationality Act of 1952. It has declared that Section 244(c)(2) constitutes an impermissible encroachment by Congress on powers necessarily but implicitly conferred on the Executive and the Judiciary "by the nature of an institutional government."

This Court is being asked by the Executive Branch, as well as by the lawfully deportable alien Chadha, to perform its most difficult and delicate duty, that of declaring an Act of Congress unconstitutional. And it is being asked to do so on no more solid constitutional ground than a general theory of separation of our tripartite form of government. There is no claim made, and therefore no basis for holding, that Section 244(c)(2) intrudes upon some specific power vested by the Constitution in the Executive or Judiciary. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 118 (1976); *Myers* v. *United States*, 272 U.S. 52, 164 (1926).

This Court should be extremely hesitant to enter this constitutional fray between the great branches of government. Indeed, there is an unusual number of good reasons for not entering the separation of powers arena. Those reasons include: (1) the Ninth Circuit's lack of jurisdiction to consider a constitutional challenge to Section 244(c)(2) on a Section 106(a) petition to review a concededly lawful deportation order; (2) the alien's lack of standing to challenge Section 244(c)(2) on a claim that it intrudes upon general powers vested in other branches of government; (3) the absence of any adverseness on the constitutional issue as between the parties to the deportation review proceeding; (4) the presence of nonjusticiable political questions arising out of the separation claim; and (5) the inseverability of Section 244(c)(2), making it impossible to award Chadha any kind of relief from the deportation order.

Because these threshold matters are better understood after examining the nature and scope of the constitutional claim, they are discussed in Part III of this brief. Part I of the brief is devoted to an examination of the separation concepts used by the Ninth Circuit to invalidate Section 244(c)(2). Part II of the brief, after examining the statutory scheme, suggests that the true constitutional footings of Section 244(c)(2) are to be found in a combination of the plenary, sovereign power of Congress over aliens, and the affirmative power of Congress to execute that alienage power by enacting such legislation as it deems "necessary and proper" to that end. See *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 421 (1819); *Atkins* v. *United States*, 556 F.2d 1028 (Ct.Cls. 1977), *cert. denied*. 434 U.S. 1009 (1978).

The Ninth Circuit misread Section 244 as conferring final authority on the Attorney General, and the INS, to suspend and cancel a lawful deportation and to adjust the status of a deportable alien. A fair reading of Section 244 as a whole, as well as its legislative history, demonstrates that Congress has not delegated such final authority. All that Congress has done is to delegate certain limited quasi-legislative functions to the Attorney General. In Section 244(c)(2) it has retained its sovereign legislative power to determine finally—with the aid of the Attorney General's recommendations—which deportable aliens should be allowed to become permanent residents of this country for reasons of "extreme hardship."

Thus the Section 244 scheme is basically an exercise in limited delegation to the Executive of legislative and quasi-legislative functions respecting aliens. See *Mahler* v. *Eby*, 264 U.S. 32, 40, 44 (1924). Section 244(c)(2) in no way involves any congressional review or "veto" of vested or finalized Executive functions.

ARGUMENT

1. NO CONSTITUTIONAL FUNCTIONS OF THE EXECUTIVE OR THE JUDICIARY ARE IMPLICATED BY SECTION 244(c)(2) OF THE IMMIGRATION ACT

To declare an Act of Congress unconstitutional on any ground is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.) And to declare an Act invalid because Congress has therein dealt with a matter "committed by the Constitution to another branch of government," or has therein exceeded "whatever authority has been committed" to Congress, "is itself a delicate exercise in constitutional interpretation." *Baker* v. *Carr*, 369 U.S. 186, 211 (1962; *Powell* v. *McCormack*, 395 U.S. 486, 521 (1969); *United States* v. *Nixon*, 418 U.S. 683, 704 (1974).

But the constitutional adjudication sought in this case is extraordinarily grave and delicate, fraught with dangers to the efficient operation of our modern federal government. It is also unique. The essence of the ruling below, the essence of the claim being pressed by the Executive Branch before this Court, is not that Section 244(c)(2) encroaches upon some specific power vested in the Executive or Judiciary. Rather, in the words of the Ninth Circuit, Section 244(c)(2) is invalid as trenching upon "a power necessarily but implicitly conferred elsewhere by the nature of an institutional government; power such as the executive authority faithfully to execute the laws, U.S. Const., art. II, §3, and the judicial power to determine cases or controversies, *id.*, art. III, § 2." J.S. App.A, 26a. Section 244(c)(2), in other words, "violates the rule of separation of powers by usurping a necessary power of another branch." *Id.*

This case is unique in the sense that never before has an Act of Congress been invalidated as encroaching on nothing more specific than what the Ninth Circuit calls those powers "necessarily but implicitly conferred elsewhere [than in Article I] by the nature of an institutional government." In the court's own words, there is "no circuit or Supreme Court authority we have found [that] holds that the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the Constitution which confers the powers upon another branch with great specificity." J.S. App. A, 25a.[9] That is certainly true as respects invasions of Executive prerogatives. In the few instances where Congress has been found to have invaded such prerogatives, the prerogatives themselves have been constitutionally vested in the Executive with specificity and exclusivity. See *Buckley* v. *Valeo*, 424 U.S. 1, 118 (1976)(encroachment on Executive's specific appointment power, Art. II, § 2, cl. 2): *Myers* v. *United States*, 272 U.S. 52, 164 (1926)(encroachment on Executive's removal power stemming from specific appointment power, Art. II, § 2, cl. 2). See also *Springer* v. *Philippine Islands*, 277 U.S. 189, 200–201 (1928).

But what is the nature of the powers that must be kept separate in the eyes of the Ninth Circuit, the powers that are implicitly conferred elsewhere than on Congress "by the nature of an institutional government"? The court finds but two such implicit conferrals: (1) the Executive authority or obligation in Article II, Section 3, to "take Care that the Laws be faithfully executed"; and (2) the vesting in the Supreme Court and in inferior courts of the Article III judicial power over cases and controversies. And to determine if Congress has unconstitutionally encroached upon these implicit conferrals, the Ninth Circuit suggests that we look to the statutory provision at stake, i.e., Section 244(c)(2), to divine if that provision constitutes

> . . . an assumption by one branch [i.e., Congress] of powers that are central or essential to the operation of a coordinate branch [i.e., the Executive obligation to take

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[9] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128 (1871), affords an early instance of invalidating an Act of Congress because it encroached upon the Article III judicial power. But the Court there found that the Act also impinged upon the Executive's exclusive pardon power, as specified in Article II, Section 2.

Article III, of course, contains no specific grants of judicial power. It merely vests the judicial power of the United States over specific categories of cases and controversies in this Court and in inferior courts established from time to time by Congress.

> care that the laws be faithfully executed, and the Judiciary's power to decide cases and controversies], provided also that the assumption disrupts the coordinate branch in the performance of its [aforesaid] duties and is unnecessary to implement a legitimate policy of the Government. See *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 433 (1977). [J.S.App.A, 37a.]

This reformulation of the general separation of powers doctrine reads suspiciously like the discredited notion that the separation doctrine means total separation of each of the three great functions of government. The Constitution provides separately for each of the three Branches, and describes each Branch as vested with the respective functions of legislating, executing and judging.[10] But the Constitution does not say that the three great functions shall at all times be kept separate and independent of each other, or that the three functions can never be blended or mixed or delegated as among the three Branches. The notion of total separation of the powers "central or essential" to the operation of the three great departments is an illogical and impractical formulation of the separation doctrine, not a constitutional command.[11]

Time and again this Court has observed "from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government." *Buckley* v. *Valeo,* 424 U.S. 1, 121 (1976); and see *United States* v. *Nixon,* 418 U.S. at 707; *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 442–443 (1977). As Madison noted in the Federalist Papers, even the "oracle" of the separation doctrine, Baron de Montesquieu, in writing that the legislative, executive and judicial powers should not be united "in the same person, or body of persons," did not mean "that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other." [12] In the more subtle language of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635 (1952),

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[10] Chief Justice Marshall first voiced the maxim that "the legislature makes, the executive executes, and the judiciary construes the law." *Wayman* v. *Southard*, 10 Wheat. (23 U.S.) 1, 46 (1825). Chief Justice Taft, among others, referred to this maxim in *Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928). But Marshall was quick to add, after stating the maxim, that "the maker of the law [i.e., Congress] may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."

[11] "The maxim that 'the legislature makes, the executive executes, and the judiciary construes the law' was thought to be a simple, descriptive formula of the separation doctrine. Unfortunately, it is not. Rather, a logical analysis makes it clear that, *strictly speaking*, the powers of and within one and the same state cannot be 'separate' or 'independent' from one another, for neither of them can be confined to 'making' or 'construing' or 'executing' the law." Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 Rutgers L.Rev. 449, 464 (1958).

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

To which should be added the *Buckley* thought, 424 U.S. at 121, that the Framers "viewed the principle of separation as a vital check against tyranny" but "likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."

Thus the modern concept of separation is pragmatic and flexible, reflecting "the contemporary realities of our political system." *Nixon* v. *Administrator of General Services, supra,* 441. It is a concept that expresses a "general attitude rather than [an] inexorable table of organization." [13] And it is a concept that recognizes not only that the great functions of government cannot be kept separate but that there is great merit in blending and mixing them in accordance with "common sense and the inherent necessities of the governmental co-ordination." *Hampton & Co.* v. *United States,* 276 U.S. 394, 406 (1928). In a realistic sense, the concept has developed into one of "blending rather than separating the three kinds of powers."[14] See also *Atkins* v. *United States,* 556 F.2d 1028, 1066–1067 (Ct. Cls. 1977), *cert. denied,* 434 U.S. 1009 (1978).

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[12] *The Federalist No. 47,* p. 325 (J. Cooke ed. 1961) (emphasis in original).

[13] L. Jaffe, *Judicial Control of Administrative Action* 29 (1965).

At the core of this "blended" form of goverment is the legislating body, the Congress of the United States. It is the body that legislates the laws that the Executive must execute faithfully and that the Judiciary must interpret and enforce. And it is the body authorized by the Constitution to blend and mix, in statutory forms, the various powers of government, and to delegate some of its own legislative functions to Executive officers and agencies. This "blending" authority emanates primarily from the Necessary and Proper Clause, Article I, Section 8, Clause 18. Under that affirmative grant of power, Congress is empowered to enact all laws "which shall be necessary and proper for carrying into Execution the foregoing [Article I] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[15]

Viewed against this background of "blended" powers, one who would invalidate an Act of Congress as an encroachment upon powers implicitly conferred elsewhere "by the nature of an institutional government" faces a formidable task. It is one thing to argue that Congress has impermissibly sought to execute a function specifically vested in another Branch by the Constitution. But as Justice Holmes said in his dissent in *Myers* v. *United States,* 272 U.S. at 177, "arguments drawn from the executive power of the President, and from his duty . . . to take care that the laws be faithfully executed, . . . seem to me spider's webs inadequate to control the dominant facts." The gossamer nature of this strand of the separation argument is even more apparent when one reflects on Justice Holmes' additional remark: "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Id.*

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[14] The "blending" phrase is that of Professor Kenneth Culp Davis. 1 K. Davis, *Administrative Law Treatise* 72 (2d ed. 1978). He also writes in elaboration:

"Except for the clear facts that the main legislative power is in Congress, the main executive power in the President, and the main judicial power in the courts, an outstanding characteristic of the American government is the non-separation of the three kinds of power.

"The Constitution itself points the way by explicitly providing for blending. It provides that the President shall participate in the legislative process by approving or vetoing bills and in the judicial process by exercising the power of pardon, that the House shall act executively in impeaching officers, that the Senate shall act judicially in trying impeachments, and that the Senate shall participate in an executive function in advising on and consenting to appointments to public office." *Id.*, 72–73.

[15] See, generally, Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 Ohio State L. J. 788 (1975).

The difficulty here is that the alleged encroachments by Congress involve executive and judicial functions not of constitutional demensions. The Article II executive functions respecting legislation, including the Section 3 "take Care" function, are merely duties to executive "the laws consistent with the provisions therefor made by Congress." *Myers* v. *United States,* 272 U.S. at 247 (Brandeis, J., dissenting). Indeed, *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), makes it conclusive that these "executive" provisions of Article II primarily empower the President simply to carry out the laws enacted by Congress.[16]

If, as has happened with respect to Section 244(c)(2), Congress has withheld from the Executive some part of the function of executing the whole of a statute, the Executive has no more constitutional authorization to perform what has been withheld than to "execute a law by disobeying it." [17] To conclude otherwise is to create an imperial Executive, possessing absolute and uncontrollable power to execute congressional laws as seen fit. So, too, the Article III judicial function with respect to statutes can rise no higher than the jurisdictional parameters permitted by Congress.[18] See *Tutun* v. *United States,* 270 U.S. 568 (1926); *Ludecke* v. *Watkins,* 335 U.S. 160, 171–172 (1948).

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[16] "The power (again actually expressed as a duty) to take care that the laws be faithfully executed is entirely dependent on the laws." Black, *The Working Balance of the American Political Departments,* 1 Hast. Con. L. Q. 13, 14 (1974).

[17] Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs,* 7 Hast. Con. L. Q. 1, 35 (1979). See also, Cooper and Cooper, *The Legislative Veto and the Constitution,* 30 Geo. Wash. L. Rev. 467, 480–487 (1962).

The functions here said to have been invaded by the Congress, in enacting Section 244(c)(2), are thus functions that lie within the power of Congress to grant or withhold in its sole discretion. That fact serves to distinguish this situation from that in *Nixon* v. *Administrator of General Services, supra.* There the alleged separation encroachment was "upon the Presidential prerogative to control internal operations of the Presidential office and therefore offends the autonomy of the Executive Branch." 433 U.S. at 439–440. Whatever else may be said about that prerogative, it is not conceptually rooted in congressional legislation; the "internal operations of the Presidential office" would appear to partake primarily of the constitutionally assigned functions of the Executive. See also *United States* v. *Nixon,* 418 U.S. at 706, dealing with "the independence of the Executive Branch within its own sphere."

For that reason, the "proper inquiry" formulated in that case and purportedly pursued by the Ninth Circuit in the instant case, J.S. App. A, 37a, may not be the proper inquiry when dealing with the Executive duty to enforce the laws as Congress enacted them. All that the *Nixon* case held was that, when the "internal operation of the Presidential office" are at stake, the proper inquiry "focuses on the extent to which it [the Act of Congress] prevents the Executive Branch from accomplishing its constitutionally assigned functions." 433 U.S. at 433.[19]

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[18] Professor Van Alstyne has observed that the second or "horizontal" half of the Necessary and Proper Clause of Article I, Section 8, ". . . assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of powers that are literally indispensable, rather than merely appropriate or helpful, to the performance of their express duties under articles II and III of the Constitution." Van Alstyne, note 15, *supra,* 799.

[19] The Court added that "Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." 433 U.S. at 443.

But where, as in the instant case, the Executive or Judicial Branch's functions are congressionally rather than constitutionally assigned, a shift in the focus of the inquiry would appear appropriate.

The House suggests that the proper inquiry in the legislative-executive context should begin with Justice Powell's question in his opinion in the *Nixon* v. *Administrator* case, 433 U.S. at 498: "whether, putting to one side other limiting provisions of the Constitution, Congress has acted beyond the scope of its enumerated powers." And as two perceptive commentators have added, the next step in the inquiry should be a balancing of "the need for accountability of congressionally delegated powers with the requirement that the effective exercise of these powers not be unduly hampered." [20] Such focusing on the constitutional source of the enactment in question is fully consistent with the view that the separation of powers concept is not meant to "divide the branches into watertight compartments," *Springer* v. *Philippine Islands*, 277 U.S. at 211 (Holmes, J., dissenting), but rather to permit that degree of intergovernmental cooperation considered "necessary and proper" if the Nation is to have the capacity "of governing itself effectively," *Buckley* v. *Valeo*, 424 U.S. at 121.

To that inquiry we now turn.

2. SECTION 244(C)(2) OF THE IMMIGRATION ACT IS A VALID DISTRIBUTION OF FUNCTIONS IN EXECUTION OF CONGRESSIONAL POWER OVER ALIENS

A. THE STATUTORY SCHEME

The starting point in assessing the validity of any statute is to read and understand the statute itself. The Ninth Circuit grievously misread the language and context of Section 244 (c)(2) of the Immigration and Nationality Act. It misread the provisions of Section 244 as delegating final authority to the Attorney General to adjust the status of an alien; and it misread the congressional procedures of Section 244(c)(2) as permitting a "legislative veto" of the Attorney General's final determination. See, e.g., J.S.App.A, 15a–16a.

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[20] Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 Ind. L. J. 367, 391 (1977).

The Ninth Circuit's reading of Section 244 is belied by the plain language and the legislative intent of these provisions. At no point in Section 244 has Congress delegated to the Attorney General or the INS any final power to determine which illegal aliens shall be allowed to remain in the United States for reasons of "extreme hardship" to the alien or his family. Congress has retained that power unto itself as part of its "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier* v. *INS*, 387 U.S. 118, 123 (1967), quoted with approval in *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972). And when either House exercises its retained power under Section 244(c)(2) to pass a resolution stating "that it does not favor the suspension of such deportation," it is exercising its own final and independent judgment on the matter. No such final judgment can be made by the Attorney General or the INS under the scheme of Section 244. That fact can best be demonstrated by a step-by-step analysis of Section 244.

(1) Section 244(a) begins with the general provision that "*As hereinafter prescribed in this section,* the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation . . ." [Emphasis added.]

This introductory portion of Section 244 as "fairly read" by the Ninth Circuit, J.S.App.A, 15a–16a, is central to that court's misunderstanding of the nature of the Section 244(c)(2) congressional proceedings, as well as to its mistaken ruling that Section 244(c)(2) is severable. The court asserts that "section 244(a) operates independently of section 244(c)(2) . . . [and] gives the Attorney General [final] power to adjust the status of the alien." *Id.*, 15a. Not so. Certainly the INS has never interpreted or applied Section 244(a) in that fashion.[21] And by its own terms, Section 244(a) says that whatever power the Attorney General has been delegated to suspend deportation and adjust status is to be exercisable only "As hereinafter prescribed in this section." Section 244(a) thus is no more than a descriptive introduction of things to come, including the ensuing descriptions in subsections (1) and (2) of categories of aliens entitled to invoke "suspension" proceedings and their burdens of proof.

(2) Section 244(a)(1) embraces the first of the two general categories of deportable aliens who may apply for "suspension" relief from the Attorney General. Included in these first categories are deportable aliens like Chadha who have overstayed their temporary admission. Because the infractions suffered by these categories are not as serious as those involved in the second general categories, Section 244(a)(2), the conditions or proof imposed by Section 244(a)(1) are not so exacting. Thus Chadha had to prove only "extreme hardship," not the "exceptional and extremely unusual hardship" required by Section 244(a)(2).

(3) Section 244(a), of course, emphasizes that the "suspension" of deportation lies within the discretion of the Attorney General. "Consequently, even though the applicant proves good moral character and hardship and meets the other announced qualifications, the grant or denial of the application, in its administrative phase, is entrusted to the sound discretion of the Attorney General." [22] In one expression this Court has declared that the approval of "suspension" is confided to the "unfettered discretion" of the Attorney General. *Jay* v. *Boyd*, 351 U.S. 345, 354, 357 (1956). Hence when the Attorney General, who has delegated most of his discretionary functions in this regard to the INS, denies a "suspension" application, the applicant's only remedy is an appeal to the courts.

In other words, the Attorney General's denial of a "suspension" application forecloses any kind of congressional consideration under Section 244(c)(2). As indicated in *Jay* v. *Boyd*, 351 U.S. 345, 356 (1956), the mandate in Section 244(c)(1) to file reports with Congress as to cases in which "suspension" applications are granted does not apply to "cases in which suspension is denied."

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[21] "Some discretionary remedies, such as suppension or deportation, cannot become effective without ratification by Congress." 2 Gordon and Rosenfield, *Immigration Lawand Procedure* § 8.14, p. 8–121 (rev. ed. 1979).

[22] 2 Gordon and Rosenfield, note 21, *supra*, § 7.9e, p. 7–111. *In McGrath* v. *Kristensen*, 340 U.S. 162, 168 (1950), the Court noted that the Attorney General's power to suspend deportation "is final [only] for such deferment of deportation."

Thus the Attorney General's denial of "suspension" is deemed a final determination for purposes of judicial review. *McGrath* v. *Kristensen*, 340 U.S. 162 (1950). But because it is so discretionary in nature, and because "suspension is not a matter of right," *Jay v. Boyd*, 351 U.S. at 356, the administrative determination is largely immune from attack unless it is shown to be clearly arbitrary, or unless "it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant," *United States ex. rel. Kaloudis* v. *Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950). See, generally, 2 Gordon and Rosenfield, *Immigration Law and Procedure* §§ 8–14, 8–15 (rev. ed. 1979). As Justice Jackson wrote in dissent in *Accardi* v. *Shaughnessy*, 347 U.S. 260, 269 (1954),

> We do think a refusal to exercise that discretion is not reviewable on habeas corpus, first, because the nature of the power and discretion vested in the Attorney General is analogous to the power of pardon or commutation of a sentence, which we trust no one thinks is subject to judicial control; and second, because no legal right exists in petitioner by virtue of constitution, statute or common law to have a lawful order of deportation suspended.

(4) On the other hand, if the INS grants the application for "suspension of deportation," as happened in Chadha's case, no judicial review of that determination is possible. Congress has not provided for such review. In this event, Section 244(c)(1) requires that "a complete and detailed statement of the facts and pertinent provisions of the law in the case shall be reported to the Congress with the reasons for such suspension." [23]

It bears emphasis that the INS grant of "suspension" in no way acts to cancel the alien's deportation or to adjust the alien's status to that of a permanent residence alien, as the Ninth Circuit assumes. A "suspension" order means what it says.[24] It is a "deferment of deportation," *McGrath* v. *Kristensen*, 340 U.S. at 168, similar to a temporary restraining order or preliminary injunction. Cancellation of deportation and adjustment of status must await favorable action by Congress under Section 244(c)(2). See *Jay* v. *Boyd*, 351 U.S. at 351. Thus the favorable administrative action is simply a deferral of the lawful order of deportation pending congressional review of the matter. In a real sense it is a recommendation that Congress finalize the suspension.

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[23] "Congress was interested in limiting grants of this relief to a minimum. It evidenced an interest only in the reasons relied upon by the Attorney General for granting an application so that it could have an opportunity to accept or reject favorable administrative decisions." *Jay* v. *Boyd*, 351 U.S. 345, 356 (1956).

(5) Reports of favorable action by the INS in suspension cases received by Congress are referred to the Judiciary Committee of each House of Congress; the staffs of the respective Immigration Subcommittees study the reports and recommend such further action as deemed warranted.[25] Usually the House committees consider the suspension cases in the first instance, followed by the Senate committee if the House action is not unfavorable. At this point, two alternative courses of action are possible under Section 244(c)(2): (a) if, within the specified period, either House "passes a resolution stating that it does not favor the suspension of such deportation," *the Attorney General is then—and only then—directed by Section 244(c)(2) to "deport such alien"* or authorize his voluntary departure; or (b) if, within the specified time, neither House passes a disapproving resolution, *Section 244(c)(2) then—and only then—authorizes the Attorney General to "cancel deportation proceedings."*

(6) Finally, if Congress has approved by inaction a change in the status of the alien pursuant to Section 244(c)(2), Section

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[24] It has been said that "suspension of deportation may be a misleading term, for the real goal of the application is to eradicate deportability and obtain permanent residence status." 2 Gordon and Rosenfield, note 21, *supra* § 7.9a, p. 7.84.

[25] "An attorney representing the subject of a suspension of deportation referred to Congress by the Attorney General may discuss his client's case with the staff of the Immigration Subcommittee of the Judiciary Committee in which it is being considered. Usually he will be given an opportunity to present the alien's full story and to submit any new or written evidence, preferably accompanied by documentary proof." 2 Gordon and Rosenfield, note 21, *supra*, § 7.9f, p. 1–175.

244(d) then provides that the Attorney General "shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation is made." Section 244(d) is the provision the Ninth Circuit improperly used in the last paragraph of its opinion, J.S.App.A, 63a. It ordered that Chadha's deportation proceedings "are deemed cancelled within the meaning of Section 244(d)." But deportation proceedings cannot be cancelled by court order or otherwise unless and until Congress has approved such cancellation pursuant to Section 244(c)(2).

Such is the scheme of Section 244. It is a scheme that in no way implicates or intrudes upon any vested *constitutional* function of the Executive or Judiciary. It is a scheme that delegates to the Attorney General most—but not all—of the functions of executing the Section 244 provisions. And it is a scheme that reflects, as the Senate brief herein demonstrates, pp. 9–17, the historic and consistent intent of Congress not to delegate to the Attorney General any final power to cancel lawful deportation orders or to adjust the status of aliens otherwise deportable.[26]

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[26] "Should this authority [of the Attorney General to suspend deportation] be treated as an exercise of purely executive power, constitutionally protected from legislative veto, or as an area of specially delegated power to which the condition of congressional approval may properly be attached? I think the origins of these provisions help to suggest the appropriate answer. Before the provision was introduced into the law, suspension of deportation orders in special hardship cases was available only through special bills introduced in Congress. The exercise of this power was apparently accepted as part of congressional power over immigration and naturalization. It did not interfere with the presidential pardoning power which was not applicable to deportation. Secretary of Labor Perkins, when she was in charge of immigration and naturalization, sought an explicit legislative authority to grant such suspensions. Somewhat like the history of the government reorganization plans, the eventual solution was a grant of suspension power to the executive (the Attorney General rather than the Secretary of Labor) subject to the condition of possible disapproval by Congress. This history seems to support the view that the condition is not an interference with a purely executive function and is therefore a constitutional grant of a mixed kind of authority." Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 Nw. U. L. Rev. 1064, 1087 n. 72 (1981).

See also Mansfield, *The Legislative Veto and Deportation of Aliens*, 1 Pub. Ad. Rev. 281 (1941).

That power was expressly and deliberately retained by Congress in Section 244(c)(2).

B. THE CONSTITUTIONAL FOOTINGS

As indicated in Part I of this brief, the separation of powers doctrine is an inadequate if not improper starting point in the constitutional analysis of Section 244(c)(2). Congress is here executing its own vested legislative powers, not those assigned to some other Branch. Cf. *Buckley* v. *Valeo,* 424 U.S. 1 (1976). As was said by the Court of Claims in *Atkins* v. *United States,* 566 F.2d 1028, 1068 (Ct.Cls. 1977), *cert. denied,* 434 U.S. 1009 (1978), "Unless Congress invades a power specifically granted to the President in the Constitution, such as the power of appointment, or fails to provide guidelines, no separation-of-powers problem arises from such a [legislative] delegation."

The prime constitutional question must thus be "whether, putting to one side other limiting provisions of the Constitution, Congress has acted beyond the scope of its enumerated powers." *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 498 (1977) (opinion of Powell, J.). That formulation of the inquiry reflects the one used in the *Atkins* case, the historic model of constitutional analysis first articulated by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. (17 U.S.) 316, 421 (1819). In assessing whether an Act of Congress is constitutional, in Marshall's immortal phraseology, the Court must be guided by this overriding consideration:

> Let the end be legitimate, let it be within tne scope of th constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The ingredients of the *McCulloch* test are threefold: (1) whether the purpose or "end" of the statute is within the constitutional powers of Congress; (2) whether the "means" employed by the statute are appropriate and plainly adapted to that end; and (3) whether those means are "not prohibited" but are consistent with the letter and spirit of other constitutional provisions. The second ingredient, of course, stems from the Necessary and Proper Clause, Article I, Section 8, Clause

18. That Clause vests Congress with affirmative power to employ and disperse whatever functions and means that Congress, in its sole discretion, deems "necessary and proper" to effectuate a valid end.

Thus the Clause enables Congress, as *McCulloch* states, "to perform the high duties assigned to it, in the manner most beneficial to the people." And the Clause permits Congress to delegate, disperse and "commit something to the discretion of the other departments," *Wayman* v. *Southard*, 10 Wheat. (23 U.S.) 1, 46 (1825), not only to help Congress execute its own powers but also to help the other departments execute their vested or delegated powers.[27]

(1) The whole of Section 244 of the Immigration Act, including subsection (c)(2) thereof, fits neatly into the "necessary and proper" mold. To begin with, in dealing with the alteration of the status of deportable aliens and allowing them to become permanent residents of this country, Congress is acting pursuant to its vested sovereign power over the admission and exclusion of aliens, including its Article I, Section 8, Clause 4 power to "establish an uniform Rule of Naturalization." This Court has consistently ruled that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909), quoted with approval in *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972). Indeed, this legislative power partakes of the Nation's sovereign power, "inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). See also *The Chinese Exclusion Case*, 130 U.S. 581, 606–607 (1889); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950); *Carlson* v. *Landon*,

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[27] In *Wayman* v. *Southard*, Chief Justice Marshall relied upon the Necessary and Proper Clause to validate an Act of Congress providing for rule-making authority in the judiciary, thereby aiding the judiciary in execution of its Article III functions. See Van Alstyne, note 15, *supra*, 813–816.

342 U.S. 524, 537 (1952); *Boutilier* v. *INS*, 387 U.S. 118, 123 (1967); *Galvan* v. *Press*, 347 U.S. 522, 530–531 (1954).[28]

So plenary is the power of Congress over the admission and expulsion of aliens that it has become axiomatic that "an unadmitted and nonresident alien [has] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Kleindienst* v. *Mandel*, *supra*, 762. It is also well established "that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier* v. *INS*, *supra*, 123. Its rules in this respect "are necessarily conclusive upon all [Government] departments and officers," *The Chinese Exclusion Case*, *supra*, 606, and are "largely immune from judicial inquiry or interference," *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952).

(2) Turning to the second or "necessary and proper" ingredient of the *McCulloch* analytical model, the whole of Section 244 of the Immigration Act, including subsection (c)(2) thereof, is seen as an appropriate means of implementing the plenary power of Congress over the admission and exclusion of aliens. In Section 244, Congress has called upon the Attorney General to perform certain functions, such as the holding of hearings, in connection with those deportable aliens who seek the grace of Congress in being excused from the rigors of a lawful deportation.[29] And it has called upon him to make recom-

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[28] "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–589 (1952). The judiciary can intervene only if "authorized by treaty or by statute, or is required by the paramount law of the Constitution." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893).

[29] It bears emphasis here that "suspension of deportation" is not a matter of right but a matter of grace. As was said in *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956): "Although such aliens have been given a right to a discretionary determination on an application for suspension, . . . a grant thereof is manifestly not a matter of right under any circumstances, but rather is

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mendations as to which deportable aliens should be allowed by Congress to become permanent residents of this Nation. But it has withheld from the Attorney General any power to make final decisions in this regard. Section 244, in other words, reflects a determination by Congress that it is "necessary and proper" to retain the ultimate legislative power to determine which deportable aliens shall be allowed to reside permanently in this country on grounds of "extreme hardship."

Utilizing the "horizontal" sweep of the Necessary and Proper Clause, Congress in Section 244 has delegated to the Attorney General the execution of some but not all the legislative power over deportable aliens. Long ago *Fong Yue Ting* v. *United States,* 149 U.S. 698, 713–714 (1893), after quoting the *McCulloch* analytical model, held that the power of Congress to expel or exclude aliens "may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend." And Chief Justice Marshall made it clear, though in another context, that Congress, when acting pursuant to this "sweeping" Clause, "may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Wayman* v. *Southard, supra,* 43.[30]

The short of it is that Congress may use its "necessary and proper" powers so as to delegate to others some, all or none of its plenary legislative power over deportable aliens; it may place conditions and limitations on any such delegation; or Congress

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in all cases a matter of grace. Like probation or suspension of criminal sentence, it 'comes as an act of grace,' *Escoe* v. *Zerbst,* 295 U.S. 490, 492, and 'cannot be demanded as a right,' *Berman* v. *United States,* 302 U.S. 211, 213." Appended to those statements in the *Jay* opinion is a footnote (n. 16) that details repeated statements in the Congress and in committee reports that described the "suspension" procedure as one in the nature of a "clemency" or "amnesty" request, as well as being "a matter of grace."

[30] The fact that a delegated legislative power is clothed with discretion in its exercise is not constitutionally relevant. *Wayman* v. *Southard,* 10 Wheat. at 46, made plain that "the maker of the law may commit something to the discretion of the other departments."

may retain and therefore exercise itself its own legislative power, particularly its uniquely sovereign power to grant or deny applications to be relieved from a lawful deportation order. Congress has exercised exactly that kind of sovereign power in the enactment of private legislation excusing a named alien from the execution of a deportation order.

It necessarily follows that when legislative power of this nature has been delegated to another department or executive officer, the power exercised by the delegatee retains its legislative or quasi-legislative nature. One who receives some part of the legislative power through the sweep of the Necessary and Proper Clause does not exercise that power by virtue of the Executive power to execute the laws of the United States. One exercises quasi-legislative power. As this Court has consistently held with respect to the "necessary and proper" transmittal of legislative rule-making authority to governmental departments and agencies, "The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 302 (1979), and cases cited. See also Justice Jackson's dissent in *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 485–486 (1952). So too, executive treatment of aliens is a delegated legislative function, as noted in *Mahler* v. *Eby,* 264 U.S. 32, 40, 44 (1924).

What was said by the Court of Claims in the *Atkins* case, 556 F.2d at 1068, with respect to the delegation to the President of authority to make judicial pay raise recommendations to the Congress, is equally pertinent to the Section 244(c)(2) procedures:

> . . . when Congress delegates authority of the kind we have here to a member of the executive branch, the delegation does not convert the authority granted into an irrevocable executive power, because in exercising the delegated functions, the executive officer merely acts as an agent of the legislative branch of the Government. This is particularly true when, as here, Congress utilizes an executive officer or administrative agency to make

> investigations and reports for the ultimate information of Congress. . . . To plaintiffs' argument that Congress cannot meddle once it has delegated power, it may be observed that legislation is itself a form of supervision. Congress has two roles: initial formulation of policy and supervision. The only pertinent question is in what manner Congress can oversee. In this case, whether the answer is by full-fledged statute or by one-House veto, there would be neither a violation of the separation-of-powers principle nor an invalid intrusion on executive power since the pay-setting function [or the power over aliens] is basically legislative in character and embodies no substantial element of, or incursion into, the administration, enforcement, or execution of the laws.

Thus whatever power the Attorney General exercises under Section 244 of the Immigration Act, like the President's power under the Salary Act to recommend pay increases, "comes not from article II but from the delegation of Congress pursuant to the necessary and proper clause [the last or "horizontal" portion thereof]." *Atkins*, 556 F.2d at 1069. The Executive cannot be heard to complain that the Attorney General has or must have power under Article II to render final "suspension" orders, to make final cancellations of deportation orders, or to make permanent adjustments in the status of deportable aliens. Article II confers no such executive power. And Congress in Section 244 has delegated no such legislative power under Article I.

The conclusion is inevitable that the vast congressional power over aliens, coupled with the Necessary and Proper Clause, fully authenticates the procedures established in Section 244 for dealing with "matters of grace." Since the Clause "can authorize a given method of obtaining a desired result, as well as ground a substantive provision," *Atkins*, 556 F.2d at 1061, the first or "vertical" portion of the Clause authenticates the Section 244(c)(2) procedures for congressional execution of its own plenary power over aliens, while the second or "horizonal" portion authenticates the delegation to the Attorney General of certain limited legislative powers in the other subsections of Section 244. At no point in Section 244 is there any congressional review or "veto" of any final or vested Executive function.

(3) The third ingredient of the *McCulloch* model is easily satisfied in this instance. The legislative review procedures established by Section 244(c)(2) are "not prohibited" by the Constitution; and they are consistent with the letter and spirit of other constitutional provisions.

(a) As discussed at length in this brief, Section 244(c)(2) procedures are not proscribed by the separation of powers doctrine. The ultimate power with respect to granting permanent residence status to deportable aliens, as matters of grace, is vested by the Constitution in the Congress and not in the Presidency or the Judiciary. The procedural methods by which Congress exercises that plenary power in no way implicate or encroach upon specific or general powers vested by the Constitution in another Branch. See *Atkins*, 556 F.2d at 1067–1068.

(b) A contention is made in the INS jurisdictional statement in No. 80–1832, pp. 11–18, that Section 244(c)(2) contravenes the procedures established in Article I for the exercise of legislative power. Such a contention is without merit, given a correct understanding of the language and purposes of Section 244 as a whole.

The Executive asserts that Article I, Section 1, which simply vests all "legislative Powers herein granted" in the two-House Congress,[31] means that "every proposed law" first must be passed by both the Senate and the House and then presented to the President for approval or veto, pursuant to Section 7, Clauses 2 and 3, of Article I. The flaw in that argument, to refer again to the *Atkins* opinion, 556 F.2d at 1062, is that Article I, Section 1, "does not automatically call for affirmative bicameral action every time a legislative power or function is being exercised or authorized. . . . [and] does not itself, as a textual matter, mechanically direct the manner in which Congress must exercise the legislative power."

Nor is it proper to describe an application for discretionary relief from a lawful deportation order as a "proposed law" necessitating adoption by the full bicameral process. Such an application, once it is conveyed to Congress with a favorable recommendation by the INS or the Attorney General, involves nothing more than a request for legislative mercy. If one House disapproves, the request fails; if neither House disapproves the request is granted. But in neither event is there any change effectuated in Section 244 or any other law. As Justice White said in *Buckley* v. *Valeo*, 424 U.S. at 285, speaking of legislative review of proposed agency regulations, "the power of either House to disapprove. . . . [is not] equivalent to legislation or to an order, resolution, or vote requiring the concurrence of both Houses." Rather, as he added in footnote 30 of his opinion, "It is as though a bill passed in one House and failed in another."

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[31] "The purpose of the clause is to locate the central source of legislative authority in Congress, rather than the Executive or the Judiciary." *Atkins*, 556 F.2d at 1062.

The illogic of the Executive's position is exceeded only by the frightening consequences that ensue were this argument to be accepted. If a proposal or request that goes to Congress under Section 244(c)(2) really involves a proposed change in the law that must be subjected to the full bicameral processes, then how does eliminating the Section 244(c)(2) procedures and ascribing finality to the Attorney General's favorable action on a suspension application become anything less than lawmaking by the Attorney General? Why is a Section 244 application pending before the Attorney General any less of a proposed change in the law than when the application comes before Congress? Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?

The constitutional consequences of accepting this argument are impermissible in the extreme. If applications for relief under Section 244 are truly proposals to change the law, then giving the Attorney General final authority to act favorably on those applications *as a matter of constitutional division of powers* would indeed make the Attorney General a lawmaker. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 587 ("the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker"). Such an argument would also have deep implications on the basic duty of the Executive to execute the laws of Congress in accordance with the conditions and limitations specified in those laws. And a chilling effect would envelop the whole doctrine of delegating legislative powers and achieving "a flexible approach to government that would facilitate accommodation to changing conditions and experience." *Pressler* v. *Simon* 428 F.Supp. 302, 306 (D.D.C. 3-judge court, 1976), *aff'd sub nom. Pressler* v. *Blumenthal*, 434 U.S. 1028 (1978).

What the *Atkins* court said about the congressional "veto" provision in the Salary Act, 556 F.2d at 1070–1071, applies with equal force to the provisions of Section 244(c)(2):

> . . . the one-House veto presented in the Salary Act is a device authorized by article I, section 1, coupled with the necessary and proper clause, and . . . it contravenes neither the broad principle of the separation of powers nor any specific provision of the Constitution. In particular we say that the necessary and proper clause, which has sanctioned the massive delegation of legislative functions over the past century, provides a firm grounding for this legislative veto. Congress plainly felt the need for this veto device, instead of relying solely on the power to override presidential recommendations by a full-fledged statute. In *McCulloch's* phrases, Congress exercised "its best judgment" in the selection of this measure and sought to "accommodate its legislation to circumstances." In the world of reality the mechanism, as we have underscored, was a fair substitute for full bicameral concurrence, did not materially invade the Executive's own sphere, and took due account of the limited presidential participation. It was a permissible accommodation of competing interests, reflecting both an appropriate check by Congress upon the Executive and some check by the Executive upon the action which could be taken by one House alone. To borrow the Supreme Court's language, some 50 years ago, in upholding congressional delegation, this particular one-House veto seems to us to pass the test of "common sense and the inherent necessities of the governmental co-ordination." *Hampton & Co.* v. *United States*, 276 U.S. at 406.

3. THERE ARE VARIOUS REASONS WHY IT IS NOT "ABSOLUTELY NECESSARY" FOR THIS COURT TO RESOLVE THE CONSTITUTIONALITY OF SECTION 244(c)(2)

It has long been true that "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U.S. 283, 295 (1905); and see *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 (1979). Here, a plethora of reasons exists for avoiding the profound constitutional confrontation between the Legislative and Executive Branches. And now that the nature and scope of that constitutional matter have been explored in some detail, and the underlying facts of the case fully examined, the reasons for avoidance can be more quickly stated and more easily understood.

A. THE SECTION 106(a) JURISDICTIONAL ISSUE

This case was initiated in the Ninth Circuit on Chadha's petition for review of his final order of deportation, pursuant to Section 106(a) of the Immigration Act, 8 U.S.C. § 1105a(a). Section 106(a) carefully limits the court's jurisdiction to "the judicial review of all final orders of deportation . . . made against aliens withni the United States pursuant to administrative proceedings under section 242(b) of this Act."

The Ninth Circuit held that the phrase "final orders" includes "all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the [Section 242(b) deportation] hearing." Hence, since the the validity of the deportation order in this case was said to rest upon, or flow from, the Section 244(c)(2) congressional decision, the court concluded that the constitutionality of section 244(c)(2) is a viable issue in a Section 106(a) review proceeding. J.S.App.A, 4a–11a.

The Ninth Circuit is wrong in both its premise and its conclusion. The validity or propriety of Chadha's deportation order has never been in issue. Chadha at all times has conceded his deportability, making the Section 242(b) deportation proceeding a mere formality. The validity of that deportation order stemmed from a proper application of Section 241 (a)(2), and was in no way dependent upon or related to the House resolution under Section 244(c)(2) disapproving a cancellation of that deportation order. Moreover, the Section 244 (c) suspension proceeding was conducted during a prolonged adjournment of the Section 242(b) deportation proceeding.

The Section 244(c) application was a matter quite separate from and unrelated to the concededly valid deportation charge. Thus from the faulty premise that "the validity of the final deportation order is contingent upon the validity of the congressional action under section 244(c)(2)," the court concluded that Chadha is "very clearly" directly challenging the deportation order itself, citing this Court ruling in *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 215 (1968). J.S.App.A, 8a. That conclusion is wrong.[illegible]

Cheng Fan Kwok held that Section 106(a) does not endow a court of appeals with jurisdiction to review, on a petition to review a final order of deportation, a denial by a district immigration director of a stay of deportation entered more than three months after entry of the final order of deportation. The Court held that the application for a stay—which is remarkably like the application for suspension in Chadha's case—"assumed the prior existence of an order of deportation . . . [and] did not 'attack the deportation order itself but instead [sought] relief not inconsistent with it' " 392 U.S. at 213. The Court added that if "§ 106(a) embraces all determinations 'directly affecting the execution of' a final deportation order, Congress has selected language remarkably inapposite for its purpose." *Id.* The inconsistency between the *Cheng Fan Kwok* interpretation of Section 106(a) and the Ninth Circuit's *Chadha* interpretation could not be clearer.

[illegible] Section 106(a)(4), 8 U.S.C. § 1105a(a)(4), provides that the petition for review of a final deportation order "shall be determined solely upon the administrative record upon which the deportation order is based." As a consequence, Chadha's petition to the Ninth Circuit brought with it the administrative record dealing the deportation order, although it also contained the administrative record of Chadha's application for suspension of deportation. But that record contains nothing concerning the congressional proceedings under Section 244(c)(2), the reasons that motivated the House resolution of disapproval, or indeed the merits of the INS sudden change of mind concerning the grant of suspension. Such a record gave the Ninth Circuit nothing more than abstract analysis and speculation "about what a unicameral disapproval device means in practice." See *Clark* v. *Valeo*, 559 F.2d 642, 650 n.10 (D.C. Cir. en banc, 1977), *aff'd sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977).

Further indication of that inconsistency is supplied by the Third Circuit's recent ruling in *Dastmalchi* v. *INS* (3d Cir. Nos. 80-2432, 80-2440, 80-2441, Sept. 17, 1981). That decision, not yet reported, directly challenges the Ninth Circuit's interpretation of Section 106(a). While the INS has called this Court's attention to the *Dastmalchi* ruling in its supplemental memorandum in No. 80-1832, it did not attach a copy of that ruling. Accordingly, for the Court's convenience, a copy is appended hereto as Appendix B, p. 4a, *infra*.

B. CHADHA'S STANDING TO CHALLENGE SECTION 244(c)(2)

Using the same faulty premise that "Chadha can directly trace his deportation to the operation of section 244(c)(2)," J.S.App.A, 17a–18a, the Ninth Circuit ruled that Chadha has Article III standing to challenge Section 244(c)(2) on grounds that it violates the constitutional doctrine of separation of powers. See J.S.App.A, 12a–20a. The court so ruled in reliance on the normal standing doctrines enunciated in such cases as *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 79 (1978). In other words, the court reasoned that Chadha has suffered an injury in fact, *i.e.*, deportation, that is traceable to the House action under Section 244(c)(2), and that the claimed injury can be judicially redressed if Section 244(c)(2) is invalidated.

There are manifold difficulties in applying the traditional standing requirements to this case, all stemming from the fact that Chadha seeks to vindicate no personal interests of his own but only those of the Executive and Judicial Branches in their separation of powers dispute with the Congress. Chadha of course has an injury in fact in the form of a threatened deportation, but it is an injury in search of some "putatively illegal conduct," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), that caused that threatened injury. The cause of the injury cannot be anything that the only other party to the case, the INS, has done. Nor can it be anything that the non-party House of Representatives has done, for the

House resolution of disapproval simply denied Chadha's plea for mercy, for relief from a concededly lawful order of deportation.

Chadha, in other words, has made "an insufficient showing of a direct nexus," *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 619 (1973), between the vindication of his interest in not being deported and the enforcement or utilization of the Section 244 (c)(2) procedure. See also *Leeke* v. *Timmerman*, No. 80–2077, Nov. 16, 1981, per curiam.

Indeed, Chadha has no real complaint to make about the deportation order, which he concedes is legal. And he has no personal complaint to make about the House action refusing to excuse him from compliance with that order. He has no legal or constitutional right to have the Congress act so as to cancel the deportation order and to permit him to become a permanent resident. And he asserts no such right. All that he does contend, all that he has ever contended, is that the legislative review procedures embodied in Section 244(c)(2) exceed the legislative powers of Congress and impermissibly intrude upon the powers vested by the Constitution in the Executive and Judiciary. In every sense of the term, he is a volunteer for the Executive Branch in asserting its separation of powers complaint against the Congress—which explains why the INS found it possible to agree with every claim and every argument that Chadha made in the Ninth Circuit and presumably will continue to make in this Court.

This situation cries out for application of the principle that "standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974); and see *United States* v. *Richardson*, 418 U.S. 166, 176–179 (1974). Chadha is so lacking in any personal stake in the outcome of this inter-Branch constitutional debate that he can generate no "concrete adverseness" on the constitutional issues, that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). All that Chadha has been able to contribute to the resolution of the separation of powers problem are the abstract arguments of his counsel.

C. THE ABSENCE OF ANY ADVERSENESS

The Ninth Circuit ruled that Chadha had asserted a concrete controversy because (1) any decision in this case "will have real meaning: if we rule for Chadha, he will not be deported; if we uphold section 244(c)(2), the INS will execute its order and deport him"; and (2) courts often "adjudicate disputes in which legal or factual matters are conceded." J.S.App.A, 22a–23a.

We put to one side the error in the court's assumption that if it rules for Chadha, what would then be left of Section 244 would permit Chadha's deportation order to be cancelled and his status adjusted. It suffices here to note that the court misunderstood the adverseness requirement. To be justiciable, a case must involve a controversy between the named parties that is "definite and concrete, touching the legal relationships of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240–241 (1937). To quote Justice Brandeis' first rule of constitutional adjudication, *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 at 346 (1936):

> The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & Grand Trunk Ry.* v. *Wellman,* 143 U.S. 339, 345. Compare *Lord* v. *Veazie,* 8 How. 251; *Atherton Mills* v. *Johnston,* 259 U.S. 13, 15.

It is impossible to describe this Section 106(a) review proceeding as anything other than a "friendly, non-adversary proceeding" devoted solely to the separation of powers doctrine. Both parties desired but one ruling, a holding that Section 244(c)(2) was unconstitutional in light of that doctrine. The deportation order became but a pawn in a profound constitutional dispute between governmental Branches. Under such non-adversary circumstances, this proceeding must suffer the fate decreed by this Court in *Moore* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 47, 47–48 (1971):

> At the hearing both parties argued to the three-judge court that the anti-busing law was constitutional and urged that the order of the District Court adopting the Finger plan should be set aside. We are thus confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution. *Muskrat v. United States,* 219 U.S. 346 (1911). . . . *Dismissed.*

See also *Granfield* v. *Catholic University of America,* 530 F.2d 1035, 1044–1045 (D.C.Cir. 1976).

It must be added that the necessary adverseness was not supplied by the appearance of the House and Senate as *amici* in the Ninth Circuit proceedings. Submitting the views and arguments of *amici* cannot create parties to the proceeding with a concrete adverseness to other parties. The whole notion of adverseness as between parties would be soon swept away were *amici* permitted to assume the role of adverse parties. Advisory opinions would then be easily available by way of inviting some *amici* to present adverse viewpoints.[33]

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[33] The Ninth Circuit also ruled gratuitously that Chadha's recent marriage to an American citizen does not render his case moot, despite his resulting eligibility for relief from deportation by filing an immediate relative petition under Sections 201(b) and 204 of the Immigration Act. J.S.App.A, 17a–18a, n. 6. Whether or not his eligibility for other relief makes his present claim moot, such eligibility further drains away whatever adverse interest Chadha may be said to have respecting the constitutionality of Section 244(c)(2). And the threat of deportation, for standing purposes, has even less nexus with the operation of Section 244 (c)(2).

D. THE "POLITICAL QUESTION" DOCTRINE

The Ninth Circuit held that Chadha's claim does not present a non-justiciable political question because "his claim is that section 242(c)(2) violates the separation of powers doctrine . . [and since] this doctrine is not textually committed to any one branch, the political question doctrine is not implicated." J.S.App.A, 20a–21a. The court added that Chadha's claim "is not that Congress has violated either the Naturalization or the Necessary and Proper Clauses."

But the doctrine cannot be so lightly dismissed in this case. By the court's own admission, the separation of powers claim relates not to any specific power conferred on the Executive or Judiciary; rather, it relates to those powers "necessarily but implicitly conferred elsewhere by the nature of an institutional government." J.S.App.A, 26a. Then where are the "judicially discoverable and manageable standards," *Baker* v.*Carr,* 369 U.S. at 217, for determining whether Congress has encroached on those "implicitly conferred elsewhere" powers?

As Part I of this brief suggests, such "implicitly conferred elsewhere" powers are weak reeds in any separation of powers analysis. It thus appears necessary to go beneath of the surface of Chadha's generalized separation claim and view it as an assault on the legislative authority to enact Section 244(c)(2). And then we do indeed meet up with nonjusticiable political questions. Both the legislative power over aliens, *Fong Yue Ting* v. *United States,* 149 U.S. 698, 712–713 (1893), and the legislative authority to supplement that power with "necessary and proper" legislation, *McCulloch* v. *Maryland,* 4 Wheat. at 423, literally abound with political questions. The exercise of both powers is so completely committed to the political departments of government that challenges thereto can never rise above the "political question" level.

In sum, the exercise of the alienage and "necessary and proper" powers of Congress generates even more political questions than the exercise of militia power (Art. I, Sec. 8, cl. 16), which *Gilligan* v. *Morgan,* 413 U.S. 1 (1973), held to partake of nonjusticiable political questions.

E. THE INSEVERABILITY OF SECTION 244(C)(2)

It is apparent that the Ninth Circuit grievously erred in holding that Section 244(c)(2) can be severed from the rest of Section 244 and that the remaining portions can do service as authority for cancelling deportation and adjusting the status of illegal aliens. See J.S. App.A, 12a–16a.

In conformity with legislative intent, Section 244 as a whole provides a tightly integrated, three-step procedure for cancelling lawful orders of deportation on grounds of "extreme hardship": (1) the Section 244(c)(1) suspension proceeding; (2) the Section 244(c)(2) legislative review proceeding; and (3) the Section 244(c)(2) authorization for cancelling deportation and the Section 244(d) authorization for adjusting status. The third step can occur only if the critical second step has resulted in congressional approval of the alien's plea for grace. Thus if Section 244(c)(2) is invalidated, there remains no statutory authority for awarding Chadha any recourse from the lawful order of deportation. Not even the presence of a severability clause in Section 406 of the Act can save the situation. See *United States* v. *Jackson*, 390 U.S. 570, 585 n. 27 (1968) ("the ultimate determination of severability will rarely turn on the presence of such a clause").

The most convincing proof of the inseverability of Section 244(c)(2) comes from the action of the Ninth Circuit in using its own judicial fiat power to "deem" that the Attorney General's suspension decision is final in this case and to "deem" that the deportation proceedings have been cancelled "within the meaning of section 244(d)." J.S.App.A 63a. Such "deeming" rests upon nothing that is left of Section 244 after invalidating subsection (c)(2). Such "deeming" represents an impermissible intrusion by the judiciary into the exclusive legislative realm of power with respect to granting dispensations to illegal aliens under threat of lawful deportation orders. It represents a total recasting of the Section 244 procedural scheme, including the grant of unreviewable finality to the discretionary orders of the INS or the Attorney General approving suspension applications. And it represents a flagrant disregard of the limited functions Congress has delegated to the courts with respect to Section 244 applications for relief. See *Tutun* v. *United States,* 270 U.S. 568, 576–577 (1926).

To recapitulate, the clear legislative desire to retain legislative control over the adjustment of status of illegal aliens mandates inseverability. Section 244(c)(2) is indispensable to the grant of permanent residence to deportable aliens. Hence Chadha cannot maintain this action, nor can he secure the relief the Ninth Circuit awarded him. See *Champlin Refining Co.* v. *Corporation Commission,* 286 U.S. 210, 234 (1932); *McCorkle* v. *United States,* 559 F.2d 1258 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978) (Salary Act congressional "veto" procedure held inseparable).

CONCLUSION

The judgment of the Ninth Circuit should be vacated with directions to dismiss the petition for review for any one or all of the jurisdictional, justiciability or prudential reasons discussed above.

Should the Court deem it appropriate to reach the constitutional merits, however, the judgment and opinion of the Ninth Circuit should be reversed. Section 244(c)(2) of the Immigration and Nationality Act of 1952 is constitutional.

Respectfully submitted,

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November 19, 1981.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 1, of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 7, Clauses 2 and 3, of the United States Constitution provide in pertinent parts:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. . . .
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

3. Article I, Section 8, of the United States Constitution provides in pertinent parts:

> The Congress shall have Power * * *
>
> * * * * *
>
> To establish a uniform Rule of Naturalization, * * *
>
> * * * * *
>
> —And

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

4. Article II, Section 1, of the United States Constitution provides in pertinent part:

> The executive Power shall be vested in a President of the United States of America.

5. Article II, Section 3, of the United States Constitution provides in pertinent part:

> * * * he shall take Care that the Laws be faithfully executed, * * *

6. Section 244(c)(1) and (2) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1254(c)(1) and (2), provide:

> (c) Fulfillment of requirements of subsection (a); report to Congress
>
> (1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of the law shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.
>
> (2) In the case of a alien specified in paragraph (1) of subsection (a) of this Section—
>
>> if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time

> above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings."

7. Section 106(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1105a(a), provides in pertinent part:

> The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, * * *

8. Other pertinent provisions of Section 244 and other sections of the Immigration and Nationality Act of 1952 are set forth in Appendix J of the INS jurisdictional statement filed in No. 80-1832, pp. 79a-83a, and in Appendix L of the Senate's petition for certiorari in No. 80-2171, pp. 85a-91a.

9. Section 1252 of Title 28, United States Code, provides as follows:

> *§ 1252. Direct appeals from decisions invalidating Acts of Congress*
>
> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2432, 80-2440, and 80-2441

ALI AKABAR DASTMALCHI,
Petitioner in No. 80-2432

and

MOHSEN TARASSOLY,
Petitioner in No. 80-2440

and

HOSSEIN SALIMINIA,
Petitioner in No. 80-2441

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

PETITION FOR REVIEW
BOARD OF IMMIGRATION APPEALS
Orders Dated August 29, September 3,
and September 4, 1980

Argued July 23, 1981

Before: ADAMS, HUNTER, and SLOVITER, *Circuit Judges*

(Filed September 17, 1981)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*

Petitioners in this appeal, nonimmigrant Iranian students found deportable by the Immigration and Naturalization Service (INS), attack on constitutional grounds the regulation which led to discovery of their illegal immigration status. In addition, petitioners contend that the INS abused its discretion both in implementing that regulation and in refusing to restore them to nonimmigrant student status. Because we conclude that this Court lacks jurisdiction under section 106(a) of the Immigration and Nationality Act to entertain such challenges, we are unable to address petitioners' claims and thus dismiss their petitions for review.

I.

As one of a number of responses to the takeover by Iranian militants of the United States Embassy in Tehran, President Carter directed the Attorney General to "identify any Iranian students in the United States who are not in compliance with the terms of their entry visas, and to take the necessary steps to commence deportation proceedings against those who have violated applicable immigration laws and regulations." 15 Weekly Compilation of Pres. Doc. 2107 (Nov. 10, 1979). On November 14, 1979, the Attorney General, acting pursuant to the Immigration and Nationality Act.[1] promulgated Regulation 214.5. requiring all nonimmigrant alien post-secondary students from Iran to report to a local Immigration and Naturalization Service representative and to provide that representative with "information as to residence and maintenance of nonimmigrant status."[2] The regulation, which became effective immediately, provided that a nonimmigrant student's failure to comply with the reporting requirement would subject him or her to deportation proceedings under section 241(a)(9) of the Act.[4]

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[1] 8 U.S.C. §1103(a) directs the Attorney General to establish such regulations as he deems necessary for carrying out his authority under the Act; 8 U.S.C. §1184(a) directs him to prescribe the time and conditions for admission of nonimmigrant aliens; and 8 U.S.C. §1251(a)(9) authorizes him to order the deportation of nonimmigrant aliens who fail to maintain their status or to comply with the conditions of that status.

[2] Regulation 214.5, 8 C.F.R. §214.5 (1979), reads in full:

> (a) An alien admitted as an F-1 or J-1 nonimmigrant student to attend a post-secondary school, including a vocational school, who is a native or citizen of Iran must report to the INS District Office or suboffice having jurisdiction over his or her school or to an INS representative on campus on or before December 31, 1979, and provide information as to residence and maintenance of nonimmigrant status. Each student must have in his or her possession at the time of reporting:
>
> (1) Passport and Form I-94;
>
> (2) Evidence from the school of enrollment and payment of fees or waiver of payment of fees for the current semester;
>
> (3) A letter from school authorities attesting to the course hours in which presently enrolled and the fact that the student is in good standing; and
>
> (4) Evidence of current address in the United States. Students must provide such other information as INS may request in order to verify maintenance of status and residence.
>
> (b) Failure by a nonimmigrant student to comply with the provisions of paragraph (a) of this section or willful provision of false information to the INS will be considered a violation of the conditions of the nonimmigrant's stay in the United States and will subject him or her to deportation proceedings under Section 241(a)(9) of the Act.

Each of the three petitioners in this appeal reported to the Pittsburgh office of the INS and provided the information required under Regulation 214.5. With respect to each petitioner, the INS ultimately issued an order to show cause, charging that student with specified violations of the Act. Petitioner Ali Akbar Dastmalchi was alleged to have remained in the United States beyond the period authorized by his stay;[5] petitioner

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NOTE —*(Continued)*

(e) A condition of the admission and continued stay in the United States of a nonimmigrant covered by paragraph (a) of this section is obedience to all laws of United States jurisdictions which prohibit the commission of crimes of violence and for which a sentence of more than one year imprisonment may be imposed. A nonimmigrant's conviction in a jursidiction in the United States for a crime of violence for which a sentence of more than one year imprisonment may be imposed, (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status under Section 241(a)(9) of the Act.

The foregoing actions are taken in accordance with the Presidential directive of November 10, 1979, issued in the course of, and in response to, the international crisis created by the unlawful detention of American citizens in the American Embassy in Tehran. Accordingly, the notice and comment and delayed effective date provisions of Section 553 of Title 5 of the United States Code are hereby waived as impracticable and contrary to the public interest.

3. Section 241(a) of the Immigration and Nationality Act, 8 U.S.C. §1251(a), provides in relevant part:

> Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . (9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted . . . or to comply with the conditions of any such status.

4. According to Petitioners' Consolidated Brief, at 6-8, Dastmalchi, a native and citizen of Iran, entered the United States on July 31, 1976, as an F-1 nonimmigrant student to attend the State University of New York at Binghamton, with an authorized stay to July 30, 1977, later extended for one year. Dastmalchi subse-

Separate deportation hearings were conducted for each petitioner by an Immigration Judge in the Pittsburgh INS office. Dastmalchi admitted the factual allegations in the order applicable to him, but refused to concede deportability and challenged the constitutionality of the reporting regulation. The Immigration Judge found Dastmalchi deportable as charged and granted him the privilege of voluntary departure in lieu of deportation. Saliminia, too, was found at a hearing to be deportable as charged and was given the opportunity to depart voluntarily. The Immigration Judge rejected Saliminia's efforts to terminate deportation proceedings on the ground that the INS impermissibly had singled out for review only students of Iranian nationality. A similar motion was denied at Tarassoly's hearing. Tarassoly was adjudged deportable for having remained in the United States longer than permitted by his visa and was granted an opportunity for voluntary departure. In light of the determination that he was deportable because of an overstay, the Immigration Judge did not decide whether Tarassoly also had violated the school transfer restrictions.

The Board of Immigration Appeals dismissed the appeal of each petitioner. In so doing, the Board rejected various challenges to the constitutionality of Regulation 214.5, and refused to review the discretionary refusals by the INS to reinstate petitioners to nonimmigrant student status despite their stay and transfer violations. Each petitioner subsequently filed with this Court a petition for review of his deportation order. Jurisdiction was alleged to lie under section 106(a) of the Immigration and Nationality Act, 8 U.S.C. §1105a(a).

II.

Petitioners advance three related challenges to the validity of their deportation orders. Even though we decline to consider the merits of these contentions, they must be set forth in some detail in order to understand why we dismiss for lack of jurisdiction.

First, petitioners contend that Regulation 214.5 on its face and in its implementation constitutes a denial of equal protection in violation of the due process clause of the Fifth Amendment. Petitioners assert that the regulation and accompanying orders draw an arbitrary and impermissible distinction between Iranian and non-Iranian nonimmigrant alien students, in that only the former were subjected to an intensive status review by the INS. Such discrimination on the basis of national origin is improper, petitioners claim, in light of the absence of a compelling connection between their own activities and the Tehran hostage incident.

Second, petitioners argue that Regulation 214.5 and subsequent INS implementing orders *in effect* served to deny to Iranian students discretionary relief "customarily afforded to students who have violated a condition of admission."[7] The INS, petitioners charge, acting in accordance with formal or informal internal instructions, mechanically and inflexibly applied the regulation to result in a deportation order even for a "minor" or "technical" infraction by an Iranian student. Petitioners assert that the arbitrary and discriminatory refusal on the part of the INS to exercise discretion constituted an abuse of discretion, in violation of the Administrative Procedure Act. By denying all discretionary relief to Iranian nonimmigrant students, they assert, the INS prejudged deportation proceedings on the basis of nationality instead of considering the merits of each case.[8] Petitioners base their contention in large part on the existence of an instruction issued by the INS on January 4, 1980, which reminded agency officials that Iranian students were to be treated "in the same manner as students of all other nationalities."[9] They conclude that, had there not been previous discriminatory treatment of Iranians by the INS, such a "curative" memorandum would not have been necessary.

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[7] Petitioners' Consolidated Brief, at 18. Such discretionary relief includes the noninstitution, suspension, or cancellation of deportation proceedings, the granting of voluntary departures in lieu of deportation, the adjustment of an alien's status, and the withholding of deportation. *See generally* 2 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* §§7.1-.12 (rev. ed. 1981).

Third, each petitioner challenges the refusal by the INS to grant him discretionary relief and reinstate him to nonimmigrant student status. Prior to the Iranian episode, "it was the common and regular practice of the Service to restore to status students who had committed technical violations of a *de minimus* nature."[10] Thus, each petitioner alleges. INS actions with respect to determination of his status were both inconsistent with past agency practices and in violation of operating instructions such as that issued on January 4, 1980.

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[8] In advancing this abuse of discretion argument, petitioners rely primarily on United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Wong Wing Hang v. Immigration and Naturalization Serv., 360 F.2d 715 (2d Cir. 1966); Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950); and Lennon v. United States, 387 F. Supp. 561 (S.D.N.Y. 1975).

[9] The January 4, 1980, instruction, entitled "Iranian Project IR. 42," reads in relevant part:

> As you know we have been successful in the Court of Appeals relative to the case of the Iranian students, and that the program is proceeding as scheduled. You are reminded that the Service should continue to consider the humanitarian aspects in all of the cases. Accordingly, all Iranian students who reported during the time period and who are out of status should be treated in the same manner as students of all other nationalities with respect to the question of reinstatement of nonimmigrant student status. Any case in which an Iranian student was not given the same consideration for reinstatement as students of other nationalities should be referred back to the District Director for reconsideration. Regional Commissioners should contact all District Directors to insure that there is no disparity between Districts in the treatment of all student cases. . . .

[10] Petitioners' Consolidated Brief, at 28. *Cf.* 1A C. Gordon & H. Rosenfield, *supra*, §4.9, at n.17 ("students who have quit school and are found out of status often are permitted to resume their student status, if a bona fide desire to complete their studies is demonstrated").

The Immigration and Naturalization Service, in its brief filed with this Court, rebutted each of petitioners' substantive attacks on Regulation 214.5 and INS actions. At the outset, however, the INS challenged the jurisdiction of this Court to entertain these petitions for review under section 106(a). It is to the jurisdictional question that we now turn.

III.

A.

In 1961, Congress amended the Immigration and Nationality Act by adding section 106(a), 8 U.S.C. §1105a(a), which vests in the courts of appeals initial and exclusive jurisdiction to review "all final orders of deportation" entered "pursuant to administrative proceedings under section [242(b), 8 U.S.C. §] 1252(b)."[11] In enacting section 106(a), Congress sought to remedy the "flagrant abuse of judicial review" by "aliens, mostly subversives, gangsters, immoral, or narcotic peddlers," who "skillfully exploit the judicial process" by "repetitive appeals to the busy and overworked courts with frivolous claims of impropriety in the deportation proceedings." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22-23, *re-*

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[11] Section 242(b) of the Act, 8 U.S.C. §1252(b), reads in part: "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation." The statute sets forth certain procedural rules to be followed in determining the deportability of an alien and provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

printed in [1961] U.S. Code Cong. & Ad. News 2950, 2967.

Despite the seemingly straightforward language of the statute — "all final orders of deportation" — considerable controversy developed as to the precise contours of appellate jurisdiction under section 106(a). For example, writing shortly after the provision took effect, Judge Friendly predicted that "dozens of decisions will be needed before the workings of the statute become clear." Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 Columbia L. Rev. 787, 796 (1963). In essence, problems arose because section 106(a) was subject to two conflicting interpretations. Some courts held that only questions involving the bare validity of a deportation order could be determined directly by a court of appeals. Other courts adopted a much broader position, concluding that the statute's ambit extended to some or all of a host of discretionary and underlying decisions which, if in error, would serve to void the deportation order, regardless of the validity of the order standing alone.[12]

To date, the Supreme Court has entered the section 106(a) controversy on three occasions. At first, it appeared that the Court might take a position in accord with those who broadly interpreted the scope of appellate jurisdiction under that statute. In *Foti v. Immigration and Naturalization Serv.*, 375 U.S. 217 (1963), Chief Justice Warren, writing for the Court, concluded that section 106(a) review extended not merely to the bare finding of deportability, but also to "all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals." *Id.*, at 229. Consequently, a request for a suspension of deportation made in the course of a section 242(b) deportation proceeding fell within the exclusive jurisdiction of the court of appeals. The following Term, in a *per curiam* opinion, the Court reversed a lower court's holding that the denial of a request before the Board of Immigration Appeals to reopen section 242(b) deportation proceedings was not appealable under section 106(a). *Giova v. Rosenberg*, 379 U.S. 18 (1964).

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[12] *Compare* Blagaic v. Flagg, 304 F.2d 623 (7th Cir. 1962) *and* Waziri v. Immigration and Naturalization Serv., 392 F.2d 55 (9th Cir. 1968) *with* Cheng Fan Kwok v. Immigration and Naturalization Serv., 381 F.2d 542 (3d Cir. 1967), *aff'd*, 392 U.S. 206 (1968) *and* Tai Mui v. Esperdy, 371 F.2d 772 (2d Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967). *See generally* C. Gordon & H. Rosenfield, *supra*, at §8.9A; Note, *Judicial Review of Final Orders of Deportation*, 42 N.Y.U. L. Rev. 1155 (1967).

In *Cheng Fan Kwok v. Immigration and Naturalization Serv.*, 392 U.S. 206 (1968), however, the Supreme Court served notice that an expansive reading of section 106(a) was unacceptable. In *Cheng Fan Kwok*, a Chinese seaman, found deportable after a section 242(b) proceeding, obtained discretionary permission to depart voluntarily and then failed to do so. In response to a subsequent order to surrender for deportation, Cheng requested a stay of deportation. When his request was rejected, Cheng petitioned this Court for review of the denial of a stay.

The Supreme Court affirmed our holding, 381 F.2d 542 (3d Cir. 1967), that we lacked jurisdiction to entertain the petition. After reviewing the language and legislative history of the provision, the Court concluded that "Congress quite deliberately restricted the application of §106(a) to orders entered during proceedings conducted under §242(b), or directly challenging deportation orders themselves." *Cheng Fan Kwok, supra*, at 215. Therefore, the Court held, "the judicial review provisions of §106(a) embrace *only those determinations made during a proceeding conducted under §242(b)*, including those determinations made incident to a motion to reopen such proceedings." *Id.*, at 216 (emphasis added). Since the denial of a stay under review was neither a "final order of deportation" nor entered in the course of a section 242(b) deportation proceeding, the Court declared that section 106(a) was inapplicable. *Id.*, at 212. The alien instead should have sought relief in an appropriate district court. *Id.*, at 210.

B.

According to the *Foti-Giova-Cheng Fan Kwok* trilogy, courts of appeals have initial jurisdiction under section 106(a) only in cases seeking judicial review of: (1) a final order of deportation entered pursuant to section 242(b) deportation proceedings; (2) an order made during a section 242(b) deportation proceeding and reviewable by the Board of Immigration Appeals (*Foti*); or (3) a motion to reopen deportation proceedings previously conducted under section 242(b) or to reconsider a final order of deportation (*Giova*). Courts of appeals have no jurisdiction under section 106(a) to review a deportation-related issue that does not fall within one of these three categories, even though resolution of that issue in the alien's favor might "directly affec[t] the execution of" his final order of deportation. *Cheng Fan Kwok*, *supra*, at 213.[13] We conclude, therefore, that this Court lacks jurisdiction to consider the claims advanced by petitioners in this appeal. Petitioners here do not challenge directly a final order of deportation, an order entered in the course of their deportation hearings, or the denial of a motion to reopen deportation proceedings. Rather, they attack: (1) the constitutionality of Regulation

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[13] As one commentator has observed, "According to the Court, section 106(a) jurisdiction mechanically mirrors the section 242(b) hearing. . . . Inclusion in the section 242(b) hearing, rather than logical relationship or practical effect, appears to be the critical determinant of section 106(a) jurisdiction." Note, *Jurisdiction to Review Prior Orders and Underlying Statutes in Deportation Appeals*, 65 Va. L. Rev. 403, 415 (1979).

214.5; (2) the alleged refusal by the INS to exercise discretion with respect to any of the Iranian student cases; and (3) the denial of discretionary relief to petitioners themselves. As we read *Cheng Fan Kwok*, none of these arguments, however compelling on its face, is encompassed within the scope of section 106(a).

Petitioners' first contention goes to the constitutionality of the regulation underlying these deportation orders. In considering this contention, it is crucial to realize that the constitutionality of underlying statutes and regulations cannot be placed in issue at section 242(b) proceedings. 1 C. Gordon & H. Rosenfield, *supra*, at §1.10e. Neither an Immigration Judge nor the Board of Immigration Appeals, in the course of a deportation proceeding, can enter an order voiding an alien's deportation in response to a constitutional objection.[14] Therefore, since under *Cheng Fan Kwok* the scope of section 106(a) jurisdiction mirrors that of the section 242(b) proceeding, it seems logical to treat constitutional challenges as not immediately appealable to courts of appeals.

Despite the force of this syllogism, a number of federal courts have concluded that a court of appeals, petitioned under section 106(a), may consider "constitutional infirmities . . . which, if well taken, would void the deportation order." *Riva v. Attorney General of United States*, 377 F. Supp. 1286, 1288 (D.D.C. 1974). In fact, two courts of appeals — the Ninth and Tenth Circuits —

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[14] *See* Matter of Cortez, 16 I. & N. Dec. 289, 291 n.2 (BIA 1977); Matter of Chery and Hasan, 15 I. & N. Dec. 380, 382 (BIA 1975) ("neither this Board nor the immigration judge may rule on the constitutionality of the statutes which we administer"); Matter of Tzimas, 10 I. & N. Dec. 101, 102 (BIA 1962) (immigration-related regulation issued by Attorney General "is binding upon the Board"); Matter of M, 9 I. & N. Dec. 132, 138 (BIA 1960) (*citing* Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803)); Matter of L, 4 I. & N. Dec. 556, 557 (BIA 1951).

explicitly have endorsed this view in decisions that postdated *Cheng Fan Kwok.*[15] For example, in *Chadha v. Immigration and Naturalization Serv.*, 634 F.2d 408 (9th Cir. 1980), the Court of Appeals for the Ninth Circuit, in rejecting an argument that it lacked jurisdiction to entertain constitutional questions under section 106(a), concluded that:

> [i]t would be anomalous . . . for Congress to provide a single form of review for deportability determinations, yet preclude from that same appeal any questions of the INA's constitutionality. We reject [such a] construction of section 106 and find that review of final deportation orders includes review of matters upon which the final order is contingent.

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[15] *See* Chadha v. Immigration and Naturalization Serv., 634 F.2d 408, 411-15 (9th Cir. 1980); Hernandez-Rivera v. Immigration and Naturalization Serv., 630 F.2d 1352, 1355-56 (9th Cir. 1980); Rubio de Cachu v. Immigration and Naturalization Serv., 568 F.2d 625, 627 (9th Cir. 1977); Pilapil v. Immigration and Naturalization Serv., 424 F.2d 6, 9 (10th Cir.), *cert. denied*, 400 U.S. 908 (1970). For similar district court decisions, *see* Shodeke v. Attorney General of United States, 391 F. Supp 219, 221 (D.D.C. 1975); *Riva, supra.*

In passing, we note that other courts apparently have addressed constitutional claims raised by aliens challenging deportation orders without ever considering whether jurisdiction existed under section 106(a) in the first place. For example, in Malek-Marzban v. Immigration and Naturalization Serv., No. 80-1779 (4th Cir. June 29, 1981), the Court of Appeals for the Fourth Circuit entertained a constitutional challenge to 8 C.F.R. §244.1 (establishing a specific time limit for voluntary departures, applicable only in deportation cases involving Iranian nationals) presented directly to it in a petition for review of a deportation order. The court rejected the constitutional attack, without referring to or discussing any jurisdictional questions. *See also* Menezes v. Immigration and Naturalization Serv., 601 F.2d 1028, 1032-35 (9th Cir. 1979) (upholding constitutionality of section 214(d) of Immigration and Nationality Act; no discussion of jursidiction); Francis v. Immigration and Naturalization Serv., 532 F.2d 268 (2d Cir. 1976) (holding section 212(c) of Act unconstitutional; no discussion of jurisdiction).

Id., at 414. Were we to follow *Chadha* and its predecessors, petitioners on this appeal would be entitled to a dispostion, on the merits, of their attacks on the constitutionality of Regulation 214.5 and accompanying INS implementing orders. For the reasons set forth below, however, we decline so to proceed.

First, the decisions upholding the initial jurisdiction of a court of appeals to resolve constitutional disputes rely either upon each other or upon pre-*Cheng Fan Kwok* precedents.[16] With one exception, *Chadha*, they make no attempt to reconcile their basic premise — that "[n]othing in [section 106(a)] is explicit in directing that only issues raised at the [section 242(b)] hearing may be raised on a petition for review." *Pilapil*, *supra*, at 9 — with the holding of *Cheng Fan Kwok*.[17] They do not explain why an alien who challenges the Act's constitutionality should be able to obtain immediate review in a court of appeals, however implausible that claim, while, under *Cheng Fan Kwok*, an alien who contests a

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16. For example, *Chadha* cites *Hernandez-Rivera*, *Rubio de Cachu*, *Pilapil*, *Shodeke*, and *Riva*, among other cases; *Rubio de Cachu* and *Riva*, in turn, cite *Pilapil*; *Shodeke* relies on *Riva* and *Pilapil*. The *Pilapil* opinion itself is based exclusively on Ferrante v. Immigration and Naturalization Serv., 399 F.2d 98 (6th Cir. 1968), which was handed down a number of months before *Cheng Fan Kwok* and which held that "initial jurisdiction exists in the Court of Appeals to review actions or decisions of the Immigration Service, which if decided in favor of the petitioner would have the effect of nullifying outstanding deportation orders." *id.*, at 103.

17. *See* Note, *Jurisdiction to Review Prior Orders and Underlying Statutes in Deportation Appeals*, *supra*, at 411 ("These cases establish the exclusive jurisdiction of the courts of appeals over constitutional challenges to underlying statutes primarily by citing one another and never reconcile with *Ferrante*, their 'foundation case,' *Cheng Fan Kwok*"). *Cf.* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 67 (1960) ("There are places in the law through which a pair of mutually oblivious doctrines run in infinitely parallel contrariety, like a pair of poolhall scoring racks on one or the other of which, seemingly at random, cases get hung up").

non-constitutional determination underlying but entered collateral to his or her deportation proceeding is relegated initially to a district court, however tenable that contention. In essence, the Ninth and Tenth Circuit opinions other than *Chadha* simply assert that section 106(a) encompasses constitutional challenges — an assertion that cannot be squared with the Supreme Court's instruction that, "[a]s a jurisdictional statute, [section 106(a)] must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok, supra*, at 212.

Second, a careful examination of the reasoning offered by the Ninth Circuit in *Chadha*, the only decision from this line of cases that attempts to demonstrate its compatability with *Cheng Fan Kwok*, serves to reinforce our view that *Cheng Fan Kwok* forecloses initial review at the appellate level of the constitutionality of the Immigration and Nationality Act. In *Chadha*, an alien who conceded his deportable status at a section 242(b) hearing requested from the INS and was granted a suspension of deportation. Subsequently, however, the House of Representatives, pursuant to section 244(c)(2) of the Act, 8 U.S.C. §1254(c)(2), disapproved that suspension and the INS again ordered Chadha deportable. At his reconvened deportation proceedings, Chadha challenged the constitutionality of the congressional disapproval; the Board of Immigration Appeals, adhering to its policy of not entertaining constitutional claims, dismissed that argument as beyond its scope of review. Chadha then petitioned the Court of Appeals for the Ninth Circuit under section 106(a) and repeated his constitutional contention. The court concluded that it did have jurisdiction to consider the constitutionality of a one-house "legislative veto" such as that employed to overrule the INS in Chadha's case.[18]

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[18] On the merits, in a potentially far-reaching decision, the court held that the procedure set forth in section 244(c)(2) violates the separation of powers by unconstitutionally intruding on execu-

Chadha begins by rejecting the suggestion that the phrase "final orders of deportation . . . made . . . pursuant to administrative proceedings under section 1252(b)" contained in section 106(a)

> limit[s] appellate review to only the actual decisions and conclusions made by the special inquiry officer during a section 242(b) hearing. . . . We conclude *the phrase 'final orders' includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.*

Id., at 412 (emphasis added). We believe that the *Chadha* court's interpretation of section 106(a) is fundamentally at odds with *Cheng Fan Kwok*. In *Cheng Fan Kwok*, the Supreme Court explicitly refused to approve the notion that "§106(a) should be understood to embrace all determinations 'directly affecting the execution of the basic deportation order,' whether those determinations have been reached prior to, during, or subsequent to the deportation proceeding." *Cheng Fan Kwok, supra*, at 210, 212. As discussed previously, the Supreme Court, in defining the scope of section 106(a), placed exclusive emphasis on whether a determination was made in the course of a section 242(b) deportation hearing; the *Chadha* formulation, however, admittedly incorporates determinations not "actually made at the hearing." A faithful application of *Cheng Fan Kwok* compels the conclusion that, because the constitutionality of either the one-house disapproval or the Iranian-related regulation could not have been tested during administrative deportation proceedings, neither matter should be

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NOTE —(*Continued*)

tive and judicial authority. *Chadha, supra*, at 420-36. See Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 Nw. U. L. Rev. 1064, 1087 n.72 (1981).

reviewable directly by a court of appeals under section 106(a).

The court in *Chadha* attempts to justify its broad reading of the language of section 106(a) on four grounds. First, it relies on precedent. Specifically, the court focuses on *Waziri v. Immigration and Naturalization Serv.*, 392 F.2d 55 (9th Cir. 1968), which held that "section 106 included the power to review 'logical predicates' to deportation orders that are 'integrally related' to and interdependent with the final order." *Chadha*, *supra*, at 412.[19] *Waziri*, however, predates *Cheng Fan Kwok* by a number of months. More important, the *Waziri* opinion cannot be reconciled with the later Supreme Court case, essentially for the same reason as mentioned above: *Waziri*, like *Chadha*, but unlike *Cheng Fan Kwok*, would permit a court of appeals to void a deportation order resulting from an invalid determination made outside of the section 242(b) process.[20]

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[19] The *Waziri* court acknowledged that the specific INS order challenged — a recission of permanent resident status entered pursuant to section 246 of the Act — was not "literally" within the scope of section 106(a) since a section 242(b) proceeding was not involved. Moreover, it observed, Waziri did not contest the "technical correctness" of his resulting deportation order. Nonetheless, the court concluded that appellate level jurisdiction could be grounded on the practical "interdependency" of the two INS orders: "section 106(a)'s objective of expedition would be thwarted if this court approved perfunctorily the deportation order while the district court reviewed the crucial underlying recission order, and afterward this court reviewed on appeal the determination of the district court." *Waziri*, *supra*, at 56-57. *Compare Cheng Fan Kwok*, *supra*, at 217 ("The result we reach today will doubtless mean that, on occasion, the review of denials of discretionary relief will be conducted separately from the review of an order of deportation involving the same alien. Nonetheless, this does not seem an onerous burden . . .").

[20] *See* K. Davis, *Administrative Law Treatise* §23.03, at 798 (Supp. 1970) ("Reconciling [*Waziri*] with the Supreme Court's statement of its holding in Cheng Fan Dwok [*sic*] five months later may be difficult").

to support an administrative factfinding of deportability. Thus, review under section 106(a) extends only to agency factual determinations involving deportability and to any orders entered during the deportation proceeding itself. *See* Note, *Jurisdiction to Review Prior Orders and Underlying Statutes in Deportation Appeals, supra,* at 416-17.

Third, *Chadha* justifies its broad reading of section 106(a) as consonant with congressional intent " 'to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts' " *Chadha, supra,* at 413-14, *quoting Foti, supra,* at 226. We agree that, in enacting section 106(a), Congress was motivated primarily by a desire to eliminate repetitive and groundless federal appeals.[22] Moreover, we admit that, given our decision today, "cases where both deportability and the INA are challenged [may] require one hearing in the court of appeals on deportability and, if all appeals are taken, potentially three other hearings in the federal court system on the constitutional challenge." *Chadha, supra,* at 414. Such a result necessarily follows from a finding of no jurisdiction, as the Supreme Court recognized in *Cheng Fan Kwok, supra,* at 217. Nonetheless, we do not believe that, for reasons of judicial economy, we should alter our interpretation either of

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Note — *(Continued)*

titioner's nationality], the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive.

[22] In addition, there is some evidence, albeit marginal, that Congress was concerned about the proliferation of ill-founded attacks upon the constitutionality of the Immigration and Naturalization Act. *See* [1961] U.S. Code Cong. & Ad. News 2950, 2967; H. R. Rep. No. 565, 87th Cong., 1st Sess. 2, 11 (1961). Nonetheless, we are bound by the Supreme Court's reading of this same legislative history in *Cheng Fan Kwok*. "This is concededly 'a choice between uncertainties,' but we are 'content to choose the lesser.' " *Cheng Fan Kwok, supra,* at 215.

section 106(a) or of the Supreme Court's holding in *Cheng Fan Kwok*. The possibility of review of a constitutional question in both a district court and a court of appeals is not an "onerous burden," particularly in light of the fact that such multi-tiered constitutional review is the norm in our judicial system. More important, "it is the result that we believe most consistent both with Congress' intentions and with the terms by which it has chosen to express those intentions." *Cheng Fan Kwok*, *supra*, at 217-18.

Finally, *Chadha* concludes that, in light of *Riva*'s holding that a district court is precluded from considering constitutional objections to the Immigration and Nationality Act, a court of appeals is bound to entertain such objections lest aliens subject to deportation never be able to raise them. *Chadha*, *supra*, at 414-15. We are unable to reconcile this assertion with the *Chadha* court's earlier contention that, if courts of appeals decline to exercise jurisdiction over the constitutional claims of alien-petitioners, "potentially three other hearings in the federal court system on the constitutional challenge" would result, *Chadha*, *supra*, at 414. In any event, we are not persuaded that, in the future, aliens in the same position as petitioners will be unable to attack the constitutionality of the Act in any other forum. On the contrary, "[i]n situations to which the provisions of §106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." *Cheng Fan Kwok*, *supra*, at 210. District courts remain open to individuals seeking declaratory and injunctive relief from allegedly unconstitutional statutes.[23]

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[23] In Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), the Court of Appeals for the District of Columbia upheld the constitutionality of Regulation 214.5. It is instructive to note that the constitutional claims addressed in *Narenji* first were made in the district court in an action for declaratory and injunctive relief. Narenji v. Civiletti, 481 F. Supp. 1132 (D.D.C. 1979). *Cf.* Yassini v. Crosland,

In sum, unlike the court in *Chadha*, we cannot read section 106(a) to encompass attacks on the constitutionality of a statute or a regulation underlying an alien's deportation order. Thus, we decline to consider the merits of petitioners' first contention in this appeal.[24]

Petitioners' second argument, that the INS abused its discretion and violated due process by "mechanically" denying discretionary relief to Iranian nonimmigrant students, parallels a contention rejected on jurisdictional grounds in *Andres v. Immigration and Naturalization Serv.*, 460 F.2d 287 (6th Cir. 1972). In *Andres*, an alien whose third preference teaching visa was not revalidated by the INS challenged that decision as a denial of due process. Additionally, the alien averred that the Secretary of Labor acted arbitrarily in promulgating the regulation upon which the INS decision was based. The court, citing *Cheng Fan Kwok*, dismissed the petition because "the issues raised by petitioner turn on matters collateral to the entry of the deportation order under §1252(b)," and therefore were not within the ju-

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618 F.2d 1356 (9th Cir. 1980) (constitutional attack on INS directive relating to revocation of deferred departure dates for Iranian nationals before court of appeals on appeal from decision of district court); Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977) (district court had jurisdiction to review constitutional challenge by child to parents' deportation order); Papakonstantinou v. Civiletti, 496 F.Supp. 105, 107 (E.D.N.Y. 1980) (district court has jurisdiction to entertain attacks on constitutionality of INA).

24. Even were we to conclude that we had jurisdiction under section 106(a) to consider the constitutional attack, and even were we then to decide that the President's proclamation and Regulation 214.5 were in fact unconstitutional, it is not at all clear that the deportability of the petitioners in this case would be affected, given that they were, as they acknowledge, out of status with applicable immigration-related statutes and regulations. In Katris v. Immigration and Naturalization Serv., 562 F.2d 866 (2d Cir. 1977), for example, the court held that, where an alien admitted his illegal status at his deportation hearing, the illegality of the arrest that brought him before the INS was not relevant.

risdiction of a court of appeals under section 106(a). *Andres, supra,* at 288.[25]

The discretion argument advanced by petitioners on this appeal, as in *Andres,* is "collateral" in that it amounts to neither a direct challenge to petitioners' "final orders of deportation" nor an attack upon an order "entered during proceedings conducted under §242(b)." To be sure, it can be argued that, had the INS exercised some sort of discretion with respect to Iranian nonimmigrant students, the deportation orders for petitioners might never have been issued. But, as we observed in disposing of the constitutional claim above, *Cheng Fan Kwok* does not permit appellate court jurisdiction over administrative decisions unconnected to the deportability determination. Quite simply, the INS decisions attacked here were not made in the course of a deportation proceeding and hence, according to *Cheng Fan Kwok,* may not be asserted before a court of appeals conformably with section 106(a). Moreover, it should be noted that petitioners' claim here raises complicated questions of fact that cannot be resolved on the basis of the barren record made available to us in this case.[26]

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[25] *Compare* Marcello v. Attorney General of United States, 495 F.2d 171, 173-74 (D.C. Cir. 1974), which held that a district court lacked jurisdiction under the Administrative Procedure Act to enjoin or invalidate INS administrative decision-making, since such judicial review is committed solely to courts of appeals pursuant to section 106(a). Significantly, in reaching this conclusion, the *Marcello* court relied upon *Foti* and *Giova,* but failed to cite or to discuss *Cheng Fan Kwok* and *Andres.*

[26] For example, even were we to reach the merits in this case, we would be unable to determine from the record whether, and if so, how the Iranian cases were handled differently from other student cases, aside from the obvious fact that the INS did not discover these infractions based on its own information but instead encountered them as a result of the implementation of Regulation 214.5. Similarly, we would be unable to assess the significance of the January 4, 1981, "curative" memorandum issued by the INS. The record does not establish to whom the instruction was issued, why it should be considered "curative" in nature, and in what sense it was "totally disregarded," Petitioners' Consolidated Brief, at 30, by the Pittsburgh INS office.

The proper forum for compilation of such a record, as well as for initial determination of the abuse of discretion argument, lies in the appropriate district court.

Petitioners' final contention — that the INS violated past practices and operating instructions when it refused to overlook petitioners' visa and transfer infractions and reinstate them to nonimmigrant student status — can be disposed of quickly, in light of the above discussion.[27] Decisions by INS district directors relating to visa extensions or to school transfers cannot be appealed to an Immigration Judge or to the Board of Immigration Appeals. *See* 8 C.F.R. §214.2(f)(7) (1981). Thus, the granting of such discretionary relief is a determination made wholly independent of and apart from any deportation proceeding involving an alien. Once again, *Cheng Fan Kwok* bars review by a court of appeals of petitioners' assertions. *See Butterfield v. Immigration and Naturalization Serv.*, 409 F.2d 170, 173 (D.C. Cir. 1969).

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[27] Petitioners rely primarily on Mashi v. Immigration and Naturalization Serv., 585 F.2d 1039 (5th Cir. 1978), where the court reasoned that, in light of courts' "pro-alien, anti-deportation policy of statutory interpretation responsive to Congress's intent to encourage 'cultural interchange,' " the INS should "loo[k] into each case [involving a nonimmigrant student] on its own facts, and decid[e] by striking a fair balance between the character of the act committed and the consequences which will flow from it." *id.*, at 1315, 1317. Consequently, the court in *Mashi* reversed a deportation order issued to a nonimmigrant student because the facts demonstrated that he was not out of compliance with the conditions of his status, and therefore was not in violation of 8 U.S.C. §1251(a)(9). Here, however, petitioners do not contend that the INS incorrectly determined that they had violated their status due to overstays or unauthorized transfers; rather, they urge that, in spite of their "technical" violations, they should be restored to nonimmigrant student status. *Mashi* does not stand for such a proposition.

IV.

We conclude that we have no jurisdiction under section 106(a) of the Immigration and Nationality Act to consider the claims advanced by petitioners on this appeal. Accordingly, we dismiss without prejudice these petitions for review.

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Nos. 80-1832, 80-2170, 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL., APPELLEES

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
RESPONDENTS

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
RESPONDENTS

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1981

NOS. 80-1832, 80-2170, 80-2171

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT,

v.

JAGDISH RAI CHADHA, ET AL., APPELLEES

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

UNITED STATES SENATE, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES REPLY BRIEF

The House of Representatives respectfully suggests that the Executive Department, speaking through the INS brief, misconceives (1) the statutory scheme respecting cancellations of deportation, (2) the constitutional considerations underlying congressional treatment of applications for discretionary cancellation of deportations, and (3) the justiciability and prudential obstacles that attend resolution of the inter-Branch conflict.

ARGUMENT

I. THE ONLY CONSTITUTIONAL QUESTION IS WHETHER CONGRESS CAN REVIEW AND RESOLVE PLEAS OF DEPORTABLE ALIENS TO BE ALLOWED TO RESIDE PERMANENTLY IN THE UNITED STATES

The House of Representatives protests the efforts being made to persuade this Court to violate two historic rules of constitutional adjudication: "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool Steamship Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39 (1885); see also *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346–347 (1936) (Brandeis, J., concurring).

The only two parties in this deportation order review proceeding (Chadha and the INS), as well as the three supporting *amici* groups, cast their united opposition to the legislative review procedures of Section 244(c)(2) of the Immigration Act in broad "generic" lectures about the constitutional scope of congressional legislating power.[1] Their opposing briefs show little if any concern about the precise facts to which the proposed "generic" constitutional rule is to be applied,[2] and no concern whatever about the consequences of making it constitutionally impossible for Congress to use the test of "common sense and the inherent necessities of the governmental coordination," *Hampton & Co.* v. *United States,* 276 U.S. 394, 406 (1928), in formulating ways for executing its own vested powers.

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[1] The *amicus* brief of the American Bar Association chides the House and Senate for seeking "to portray this case as involving a unique and distinctive statutory provision which, while falling within a general class called 'legislative veto', can only be assessed individually in light of its own peculiar history and purpose" p. 2). The ABA "position" is claimed to be that "the constitutional infirmities of Section 244(c) are neither created by, nor can be validated by, its own peculiar history and purpose, but rather arise from the *generic invalidity* of the legislative veto device" (p. 5) (emphasis added).

In other words, the ABA requests this Court to invalidate the "[h]undreds of legislative veto provisions [that] have been enacted, most within the last decade" (p. 2). Included within that multitude of provisions are, according to the ABA, at least seven variations of the veto device, such as the one-House veto, the two-Houses veto, one-and-a-half-House vetoes, and concurrent resolutions, Pp. 2–3.

The Executive seems disposed to turn this into another "episode in a long tug of war between the Executive and Legislative Branches of the Federal Government respecting *the permissible extent of legislative involvement in rulemaking* under statutes which have already been enacted." *Buckley* v. *Valeo,* 424 U.S. 1, 140 n.176 (1976) (emphasis added). As if to underscore its position that legislative review of deportation-waiver pleas is "generically" identical with "legislative involvement in rulemaking," the Executive has submitted to this Court copies of the recent opinion of the District of Columbia Circuit in *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission* (D.C. Cir. Nos. 80–2184, 80–2312, Jan. 29, 1982).[3] That decision invalidated a particular legislative review provision involving agency rulemaking. But the court took pains to note that its decision, which was described as "truly one of first impression" (slip opinion, p. 43), was premised on considerations significantly different from those involved in the Court of Claims ruling in *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cls. 1977), and in the Ninth Circuit ruling in the instant *Chadha* proceeding. Neither of

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[2] The *amicus* brief of Certain Members of the House of Representatives claims that their interests in opposing the validity of Section 244(c)(2) "do not lie particularly in the direction of the suspension of Chadha's deportation, but in protecting the bicameral process required by Article I of the Constitution and in determining at what point the legislative process . . . ceases and at what point the faithful execution of the laws by the Executive begins." Brief, p. 3.

[3] The two Houses of Congress, like the Executive, appeared before the District of Columbia Circuit as *amici.* The House of Representatives has already authorized the Speaker to intervene in that case if necessary "to protect the interests of the House." See House petition for certiorari in the instant proceedings, No. 80-2170, pp. III–IV. The House intends to intervene below in order to have standing to petition this Court for review of the *Consumer* ruling.

Since Chadha's case obviously entails no "legislative involvement in rulemaking," what does it involve? What are the characteristics of the Section 244 procedures that the Executive would measure against the Presentment Clause requirements and the general separation of powers doctrine? What is it about the House disapproval of Chadha's plea for a waiver of his lawful deportation order that makes the President so anxious to exercise his own approval/disapproval powers under the Presentment Clause? What are the Executive concern and function with respect to treating Chadha's plea for a discretionary waiver that renders Congress impotent, under the separation of powers doctrine, from making a final resolution of the plea?

Answers to those questions are found only by first examining the unique and distinctive Section 244, which has its own peculiar purpose and history. The answers are not to be found, as the Executive would have it, by looking first at the "generic" deficiencies said to lurk in all "one-House veto" situations, including Section 244(c)(2), and then fitting the Section 244 (c)(2) procedure into the mold of those alleged constitutional deficiencies. What, then, are the fundamental characteristics of the Section 244 scheme?

1. Section 244 establishes the eligibility requirements and the procedural steps to be taken by deportable aliens who seek to be excused from their deportable status on grounds of hardship. Such pleas can be granted only on the authority of the Congress. It is the Congress, not the Executive, whose legislative power over the admission, exclusion and expulsion of aliens has been repeatedly recognized by this Court as sovereign and virtually unlimited in nature. See, e.g., *Fiallo* v. *Bell,* 430 U.S. 787, 792 (1977). And since Congress has such "sovereign power to expel aliens," *Mahler* v. *Eby,* 264 U.S. 22, 40 (1924), any legislative involvement in determining whether excludable aliens should be allowed to stay permanently in this country is constitutionally legitimate, subject only to the commands of procedural fairness and due process.

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the Court of Claims that a "one-House veto" of a salary recommendation is not an act requiring concurrence of both Houses in an "approach" rejected by this Court in *Kilbourn* v. *Thompson,* 103 U.S. 168, 182 (1881).

2. When a deportable alien, like Chadha, files an application for relief under Section 244, the alien is not seeking an adjudication of any legal or statutory rights. As Justice Jackson once observed, a deportable alien has no legal right "by virtue of constitution, statute or common law to have a lawful order of deportation suspended"—or cancelled. *Accardi* v. *Shaughnessy,* 347 U.S. 260, 269 (1954). The opinion of the Court in *Jay* v. *Boyd,* 351 U.S. 345, 355 (1956), is decisive on this point, and bears repetition: [6]

> Although such aliens have been given a right to a discretionary determination on an application for suspension [under Section 244], . . . a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it "comes as an act of grace," *Escoe* v. *Zerbst,* 295 U.S. 490, 492, and "cannot be demanded as a right," *Berman* v. *United States,* 302 U.S. 211, 213. And this unfettered discretion of the Attorney General with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole.

And, added the Court (at 356), the Section 244(c) procedure, whereby the Attorney General must file with Congress a report as to all cases in which suspension is granted but does not file such a report where suspension is denied, "actually emphasizes the fact that suspension is not a matter of right." [7]

3. Since a Section 244 applicant has no legal right to a congressional "act of grace" in excusing him from the effects of a lawful deportation order, neither the Attorney General's discre-

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[6] The INS brief (p. 41, n. 28) seeks to distinguish *Jay* v. *Boyd* on the ground that it involved a different category of deportable aliens, a category that is subject to the slightly different legislative review procedures of what is now Section 244(c)(3). But that is a distinction without a difference. The portion of the opinion quoted above deals with the general nature of an application for Section 244 relief, whatever category the applicant may fall into.

[7] See also *United States ex rel. Hintopoulos* v. *Shaughnessy,* 353 U.S. 72, 77 (1957): "[T]he statute does not contemplate that all aliens who meet the minimum legal services will be granted suspension. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility. . . ."

tionary decision to deny a suspension request nor one House's discretionary disapproval of the request to cancel deportation can be what the Ninth Circuit described as "an enactment of positive law that alters individuals' substantive rights." J.S.App. 59a; 634 F.2d at 434. Chadha's status at all times has been, and remains, that of a lawfully deportable alien. That status did not change when the INS granted him a temporary stay of deportation. And the refusal of the Congress to permit a change in that status as "a matter of grace" cannot qualify as, in the Executive's words (INS brief, p. 42), "a change in the law as applied to a particular alien."

4. Contrariwise, Congress does permit the deportation proceedings to be cancelled and the alien's status altered when, in the words of Section 244(c)(2), "neither the Senate nor the Hous of Representatives shall pass such a resolution [stating in substance that it does not favor the suspension of such deportation]" within the specified period of time.[5] But that status change comes about only as "a matter of grace." The alteration in status results not from any change in "positive law" but simply from a discretionary dispensation of grace by the one body, the Congress, that has the sovereign power—a most awesome power—over the fate of deportable aliens.

5. The heart of the Section 244 scheme is its limited and conditioned delegation to the Attorney General of some—but not all—of this legislative power to provide relief to deportable aliens as "a matter of grace." In a real sense, to the Attorney General has been delegated the certiorari-like function of weeding out the ineligible applicants and those who "in his discretion" are deemed unworthy of relief; those applicants who survive the Attorney General's processes are awarded temporary stays of deportation, pending reports of their cases to the Congress and pending final resolution by Congress pursuant to

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[5] The fact that deportation is cancelled after the Attorney General has reported the stay of deportation to Congress and neither House thereafter passes a resolution of disapproval does not mean takes no interest or action in the matter. All reports of stays granted by the Attorney General are carefully studied by congressional subcommittees dealing with immigration matters. If the committees conclude that the alien is entitled to an "extreme hardship" waiver, no resolution of disapproval is drafted or submitted to the respective Houses.

Section 244(c)(2). Specifically, the Attorney General has been delegated the following functions under Section 244:

(a) The function of receiving and considering in the first instance all applications or suspension of deportation under Section 244, filed by otherwise deportable aliens;

(b) The function of denying those applications that fail to meet the eligibility requirements of Section 244(a), or that are deemed "in his discretion" to be unworthy of relief; such denial orders are considered final for purposes of judicial review (*McGrath* v. *Kristensen,* 340 U.S. 162 (1950));

(c) "Upon application by an alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien" Section 244(c)(1), an order in the nature of a temporary stay or injunction that prevents the deportation order from becoming effective;[9]

(d) The function of reporting to the Congress all cases in which deportation has been suspended, including "a complete and detailed statement of the facts and pertinent provisions of law in the case . . . with the reasons for such suspension" (Section 244(c)(1));

(e) The function of deporting the alien, or authorizing the alien's voluntary departure, in the event that either House "passes a resolution stating in substance that it does not favor the suspension of such deportation" (Section 244(c)(2)); and

(f) The function of cancelling deportation (Section 244(c)(2)) and of recording the alien's lawful admission for permanent residence as the date of cancellation (Section 244(d)), in the event that neither House passes a disapproval resolution within the specified period.

It seems clear enough that none of the foregoing functions of the Attorney General represent execution of any exclusively executive power. Without Section 244, the Attorney General can do nothing by way of staying or cancelling a lawful deportation order. What he can do and does do is by way of delegated powers specified in Section 244, no more and no less. As this Court has so often observed, power delegated to some other officer or organ of government "must be rooted in a grant of such power by the Congress and *subject to limitations which that body imposes." Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979) (emphasis added).[10]

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[9] Webster's Third New International Dictionary defines the first meaning of the word "suspend" as follows: "to debar or cause to withdraw temporarily from any privilege, office, or function."

Such, then, is the scheme of Section 244. It is a scheme for dispensing a unique form of Congressional pardon, an "act of grace" stemming from the plenary power of Congress over deportable aliens. And it is a scheme whereby Congress has mandated the Attorney General to gather the facts and to provide the meritorious and eligible applicants temporary relief from deportation, pending review and final decision by Congress. That is the scheme, in short, against which must be measured the constitutional objections of the Executive.

2. THE CONGRESSIONAL REVIEW PROVISIONS OF SECTION 244(C)(2) ARE INSEVERABLE FROM THE INTEGRATED WHOLE OF SECTION 244

Given the fact that the whole of Section 244 is a set of procedures designed to implement the power of Congress to dispense humanitarian waivers of deportation as "a matter of grace", to invalidate the core of that scheme—the congressional review procedures embodied in Section 244(c)(2)—is to leave "what is left" of Section 244 quite inoperative as a law. Cf. *Champlin Refining Co.* v. *Corporation Commission,* 286 U.S. 210, 234 (1932); *Buckley* v. *Valeo,* 424 U.S. 1, 108–109 (1976). What precedes Section 244(c)(2) are merely preliminary steps and procedures leading to congressional approval or disapproval of an "act of grace." And what follows Section 244(c)(2) are the consequences of congressional action taken pursuant to Section 244(c)(2). Putting together what precedes and what follows operate as a law.

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[10] The initial use of the Section 244(c)(2) device of congressional review of deportation-waiver pleas appeared in the Alien Registration Act of 1940, 54 Stat. 670. It was perceived by contemporary commentators as "the device of a delegation of powers to the executive, subject to a contingent congressional veto on their use." Mansfield, *The Legislative Veto and the Deportation of Aliens,* 1 Pub.Ad.Rev. 281 (1941).

In an effort to breathe life into the preliminary procedures before the Attorney General, the INS and Chadha would have this Court upgrade the effect of the Attorney General's orders temporarily suspending deportation. Such orders would become final orders cancelling—not merely suspending—deportation proceedings. In effect, the Attorney General would become the final and unreviewable dispenser of the congressional power to waive lawful orders of deportation as matters of grace.

The Senate briefs have fully documented the consistent refusal of Congress to delegate or confer such final dispensing power on the Attorney General.[11] That being true the Executive is really asking this Court to rewrite the portions of Section 244 that precede Section 244(c)(2) in a manner contrary to the expressed will of Congress. Most certainly, "[t]his is legislative work beyond the power and function of the court." *Hill* v. *Wallace,* 259 U.S. 44, 70 (1922).

Even more difficulty is encountered in any effort to make operative, assuming the congressional dispensation feature of Section 244(c)(2) is stricken, the succeeding portions of Section 244. In a remarkable passage in the INS brief (p. 61, n. 39), the Executive would have this Court give vitality to the last sentence of Section 244(c)(2)—"If within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings"—by a judicial fiat that "deportation proceedings would be cancelled when the period specified in Section 244(c)(2) expires." And new life would be injected into Section 244(d) by the simple expedient utilized by the Ninth Circuit, i.e., by judicial decree "the deportation proceedings are *deemed* cancelled within the meaning of Section 244(d)," 634 F.2d at 436, so that the Attorney General's "grant of suspension of deportation *automatically* leads to a grant of permanent resident status if the suspension is not lawfully disapproved by Congress," INS brief, p. 77. (Emphasis supplied).

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[11] See, e.g., S. Rep. No. 1204, 80th Cong., 2d Sess. 4 (1948); H. Rep. No. 647, 80th Cong., 1st Sess. 2 (1947). In those reports, the Judiciary Committees of the respective Houses rejected legislation proposed by the Executive to authorize the Attorney General to cancel deportations without congressional review. To the same effect, see H. Rep. No. 1365, 82d Cong., 2d Sess. 63 (1952).

In sum, the Executive and Chadha would reduce the role of Congress under the judicially revised Section 244 to (1) receiving reports from the Attorney General of his final orders cancelling deportation, and (2) retaining power during the "report and wait" period of enactioning "a law" requiring a particular alien's deportation "subject to whatever restraints may be imposed by the Bill of Attainder Clause." INS brief, p. 61, n. 39. All of this proposed rewriting serves to emphasize that, as the remainder of Section 244 is now written, the essential precondition for cancelling deportation and altering the alien's status is the meaningful acquiescence of both Houses in dispensing such relief, pursuant to the core congressional review procedures of Section 244(c)(2). The only basis for cancelling a deportation under Section 244 is by way of a congressional "act of grace" under Section 244(c)(2).

Thus Chadha cannot obtain the relief he seeks if the congressional role under Section 244(c)(2) is invalidated. The purpose of the whole of Section 244 is not to validate or invalidate an order of deportation; rather it is to establish a procedure permitting Congress to forgive compliance with that lawful order—"a matter of grace." Remove the Section 244(c)(2) source of grace and Chadha remains subject to the unforgiven but lawful order of deportation.

3. JUSTICIABILITY AND JURISDICTIONAL HURDLES PRECLUDE REACHING THE CONSTITUTIONAL ISSUES IN THIS CASE

Enough has been said about the inseverability of Section 244 (c)(2) to establish that Chadha simply lacks standing to challenge the constitutionality of that section. No court can give him the relief he seeks, the lifting of the lawful order of deportation. Only an "act of grace" by Congress under Section 244(c)(2) can give that relief. Thus he cannot show compliance with one of the ingredients of Article III standing, i.e., that his alleged injury "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976); and see *Valley Forge College* v. *Americans United,* No. 80-327, slip opinion, p. 7 (Jan. 12, 1982).

Nor has Chadha met the other minimal requirements of Article III standing. The injury that he asserts, the threatened deportation, is not traceable to any "putatively illegal conduct of the defendant," *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), for the only defendant in this case is the INS. And the only threat emanating from the INS is a stout assertion that it will enforce the lawful order of deportation at least if this Court validates Section 244(c)(2). No, the only "injury" that Chadha has suffered in his challenge to Section 244(c)(2) is the refusal of the Congress to forgive his compliance with the deportation order.

But such a failure to receive a discretionary dispensation, as we have seen, cannot qualify as an injury to any legal statutory or constitutional right. Moreover, even if there were some kind of legal injury involved, the injury here is one "that results from the independent action of some third party not before the court," *Simon*, 426 U.S. at 42. Congress certainly was not a party defendant in the court below. Chadha thus comes perilously close to asserting no more than an "abstract injury in nonobservance of the Constitution," *Schlesinger* v. *Reservists Committee*, 418 U.S. 208, 223, n. 3 (1974), particularly since his Section 244(c)(2) is grounded solely on a separation of powers injury to the Executive.

Indeed, the non-personal and abstract nature of Chadha's constitutional challenge serves to highlight the undenied fact that were no adverse parties before the Ninth Circuit as to the sole matter in issue, the validity of Section 244(c)(2). The House does not assert, as the INS brief states (p. 73), that this was a "feigned" suit. But it does contend that on the constitutional issue and ensuing relief there was no adverseness as between the parties. And there was no adverseness because Chadha chose to base his contentions solely on the Executive constitutional controversy with the Congress.

It will not do to say that "the defense of the statute was undertaken by Congress itself." INS brief, p. 74. The House and Senate appeared before the Ninth Circuit only as *amici*, not as parties intervenor. And they appeared there not only to give their views on the validity of Section 244(c)(2) but to protest this obvious lack of adverseness between the two parties, relying upon *Moore* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 47 (1971). And when the House and Senate intervened after the Ninth Circuit's judgment, they did so in large part to be able to pursue that protest to this Court.

There is no precedent for adjudicating a constitutional controversy between two Branches of Government where one of the Branches appears only as an *amicus. United States* v. *Lovett,* 328 U.S. 303 (1946), is not such a precedent; in that case the private parties plaintiff had a personal controversy with the United States, one Branch of which chose not to defend the validity of a congressional statute. *Lovett,* in other words, did not involve an inter-Branch controversy, with one Branch appearing only as *amicus.*

To permit the presence of an *amicus* to create the necessary adverseness between parties would create a far-reaching if not dangerous precedent. It would drain away significance from the Article III requirement that there be that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U.S. 186, 204 (1962).

If the Court agrees that there was no adverseness between parties in the court below, there might be left a problem of whether that lack of adverseness can be cured in appellate proceedings in this Court. Here, of course, the House and Senate appear as parties intervenor, having intervened below after judgment. The House suggests that the Court has no appellate jurisdiction over a non-case or controversy in the lower court. To create a new controversy in this Court through intervention and realignment of adverse parties would seem possible only in the exercise of this Court's original jurisdiction. Compare *Bob Jones University* v. *Simon,* 416 U.S. 725, 740, n. 11 (1974); *Princeton University* v. *Schmid,* No. 80-1576, per curiam (Jan. 13, 1982).

A few final words are appropriate as to the Ninth Circuit's lack of jurisdiction under Section 106(a) to consider the constitutionality of Section 244(c)(2). The INS brief (p. 67) asserts that Chadha "manifestly does challenge the validity of the order requiring him to be deported from the United States."

The House respectfully disagrees. The validity of the deportation order in no way depended upon the action of the Congress or one House thereof under Section 244(c)(2).

To repeat, all that happened under Section 244(c)(2) was a refusal to grant a congressional pardon of Chadha's deportable status. That refusal occurred entirely outside the administrative proceedings before the INS, thus making applicable the rationale of *Cheng Fan Kwok* v. *INS,* 392 U.S. 206 (1968). What this Court was talking about in *Foti* v. *INS,* 375 U.S. 217 (1963), and what Congress had in mind in enacting Section 106(a), were situations where the INS *denies* an application for suspension of deportation. What we are dealing with here, however, is a case where the INS has *granted* an application, thus ending the administrative phase of Section 244; thereafter, in the independent review by Congress under Section 244(c)(2), Congress has refused to grant any discretionary relief from the lawful order of deportation.

Section 106(a) is not equipped to permit appellate review of congressional action under Section 244(c)(2), particularly since that action has no effect whatever on the propriety or validity of the deportation order.

4. SECTION 244(c)(2) IS A "NECESSARY AND PROPER" IMPLEMENTATION OF THE PLENARY CONGRESSIONAL POWER OVER DEPORTABLE ALIENS

The position of the House on the Constitutionality of Section 244(c)(2) has been fully set forth in its opening brief. Suffice it here to say that this section, like the other provisions of the Immigration and Nationality Act, represents an exercise by Congress of its affirmative Article I power to make all laws that it considers "necessary and proper" for carrying into execution its vast power over aliens. And, in exercise of the second or horizontal part of the Necessary and Proper Clause, Congress has delegated to the Attorney General certain limited quasi-legislative functions in aid of its Constitutional power to exempt certain aliens from deportation.

The INS brief has no meaningful discussion of this Constitutional footing of Section 244 (c)(2), while Chadha's brief makes two limited references to the fact that the Necessary and Proper Clause has "built-in limitations," (pp. 24, 44). For the most part, the briefs concentrate on limitations on the Congressional authority "to make laws," limitations said to emanate from the separation of powers doctrine and from the Presentation Clause. In the analytical sense, the briefs approach legislation power from a negative point of view, in sharp contrast to the affirmative approach mandated by the Necessary and Proper Clause.

Justice Holmes once wrote that constitutional arguments in inter-Branch controversies drawn mainly from the executive power of the President or the President's duty to faithfully execute the laws "seem to me spider's webs inadequate to control the dominent facts." *Myers* v. *United States*, 272 U.S. 52, 177 (1926) (Holmes, J., Dissenting). The same kind of spider's webs seem to be woven into the INS and Chadha arguments concerning the limitations on legislative powers.

The glory of the Constitution, as Chief Justice Marshall put it, is that it is intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 415 (1819). And to give content to the broad powers conferred on the legislature, and to permit it to adapt those powers to changing crises, the legislature must have "the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *Id.* 415–416. It is the Necessary and Proper Clause that gives the Congress that capacity. It permits the Congress to mold its legislation and to execute its vested powers in ever-changing and innovative ways. To deny the affirmative and creative force of this Clause, as the INS and Chadha have done, is to reduce it to no more than "a splendid bauble." *Id.* 421.

Of course Congress cannot reply on the Clause to enact laws prohibited by other parts of the Constitution. But even on that score, John Marshall warned that other words of limitation must "imperiously require" that an inpediment be placed in the choice of means that this Clause gives to Congress. It is difficult indeed to spell from the Presentment Clause or the separation doctrine any imperious requirement that Congress be forbidden to aid its execution of its power over aliens by means of the procedural techniques employed in Section 244 (c)(2).

On the contrary, the Necessary and Proper Clause is an affirmative source of power for adapting and innovating techniques of modern government. What provision in the Constitution imperiously forbids the Congress from finding new legislative ways to treat with the problem of illegal aliens? What provision in the Constitution imperiously outlaws legislative experiment in the "one-House veto" technique of governmental coordination and oversight?

Neither the INS nor Chadha can point to any such imperious proscriptions. Nor do they refute the strength of the statements in *Atkins* that the Necessary and Proper Clause "can authorize a given method of obtaining a desired result" 556 F.2d at 1061 and thus can authorize use of procedures short of bicameral legislation for exercising a legislative power or function, particularly since Article I, section 1 "does not automatically call for affirmative bicameral action every time a legislative power or function is being exercised or authorized, . . ." 556 F.2d at 1062.[12]

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[12] This same thought was expressed by Attorney General Bell, 43 Op. Atty. Gen. No. 10 (Jan. 31, 1977), where he advised the President that the legislative disapproval provision Organization Act is constitutional. He there pointed out (p. 2) that "the statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress." The only response of the INS to Attorney General Bell's opinion is to repudiate it. Brief, p. 58, n. 37.

CONCLUSION

For these reasons, supplementing those set forth in the opening brief of the House, the judgment of the Ninth Circuit should either be vacated or reversed. If the constitutional merits are reached, Section 244(c)(2) of the Immigration and Nationality Act of 1952 should be declared constitutional.

Respectfully submitted.

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